

6
No. 95-1100

Supreme Court, U.S.

FILED

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In The

CLERK

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF
BRYAN COUNTY, OKLAHOMA,

Petitioner.

vs.

JILL BROWN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 5, 1996
CERTIORARI GRANTED APRIL 22, 1996

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RELEVANT DOCKET ENTRIES

11/22/91	Original Complaint filed (bhs)
11/22/91	Summons(es) issued for Bryan County, OK, Bryan Cty Sheriff, B J Moore, Stacy Burns, Robert Morrison (bhs)
11/22/91	Filing Fee Paid; FILING FEE \$120 RECEIPT #52465 (bhs)
11/25/91	Demand for jury trial by Jill Brown (bhs)
12/9/91	Order, authorizing service of process (signed by Judge Paul Brown) cc: atty on 12-9-91 (bhs)
12/10/91	Return of service executed as to Robert Morrison 12/9/91 Answer due on 12/30/91 for Robert Morrison (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to Bryan Cty Sheriff 12/9/91 Answer due on 12/30/91 for Bryan Cty Sheriff (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to Bryan County, OK 12/9/91 Answer due on 12/30/91 for Bryan County, OK (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to B J Moore 12/9/91 Answer due on 12/30/91 for B J Moore (bhs) [Entry date 12/11/91]
12/20/91	Answer to Original Complaint by Stacy Burns (bhs)
12/27/91	Order requiring proposal for contents of scheduling order, set notice of compliance due

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for 1/23/92 (signed by Judge Paul Brown) s/12-26-91 cc: attys on 1-2-92 (bhs) [Entry date 01/02/92]

12/30/91 Answer to Original Complaint by B J Moore, Robert Morrison (bhs) [Entry date 01/02/92]

12/31/91 Amended Answer to Original Complaint by B J Moore, Robert Morrison: amends [10-1] answer (bhs) [Entry date 01/02/92]

1/16/92 Memorandum by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Robert Morrison to dismiss (bhs)

1/16/92 Memorandum by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Robert Morrison in support of [12-1] motion to dismiss (bhs)

1/23/92 Joint proposal for contents of scheduling order (bhs)

1/24/92 Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 01/27/92]

1/24/92 Response by Jill Brown to [12-1] motion to dismiss (bhs) [Entry date 01/27/92]

2/3/92 Return of service executed as to Stacy Burns on 12/13/91 by personal service. Answer due on 1/2/92 for Stacy Burns (bhs) [Entry date 02/04/92]

2/5/92 Order granting [15-1] motion to amend [1-1] complaint, set amend, join, implead parties by 2/10/92 (signed by Judge Paul Brown) cc: attys on 2-5-92 (bhs)

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2/7/92 Amended complaint by Jill Brown, (Answer due 2/18/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan Cty Sheriff, for Bryan County, OK) amending [1-1] complaint (bhs)

2/12/92 Scheduling order setting Amend, join, implead, parties by 5:00 3/16/92; Pla to file mo to amend by 5:00 6/1/92; Dft to file mo to amend by 5:00 6/15/92; Deadline for filing of all pre-trial motions 5:00 7/1/92; Discovery cutoff 5/15/92; Pretrial order to be submitted on or before 5:00 8/3/92; Requested jury instructions by 5:00 8/3/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan Cty Sheriff, for Bryan County, OK, for Jill Brown; Final Pretrial conference on 9:00 9/25/92; Expert witness list by 4/15/92 for all defendants and for Jill Brown; Jury trial on 9:00 10/5/92; (signed by Judge Paul Brown) cc: attys on 2-12-92 (bhs)

2/25/92 Order granting in part, denying in part [12-1] motion to dismiss & Bryan Cty Sheriff's Dept is dismissed and all causes of action brought agnst dfts Morris and B.J. Moore, except the federal cause of action brought pursuant to 42 USC 1983. OB Ref: v63 p88 (signed by Judge Paul Brown) cc: attys on 2-26-92 (bhs) [Entry date 02/26/92]

3/9/92 Notice of attorney appearance for Bryan County, OK, B J Moore, Robert Morrison by Jack G Kennedy (bhs) [Entry date 3/10/92]

4/15/92 Witness list filed by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison (bhs)

4/15/92 Witness list filed by Jill Brown (bhs)

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5/5/92 HOTLINE CONFERENCE: by Magistrate Judge Harry W. McKee (exr) [Entry date 02/01/93]

5/8/92 Order that pla experts shall not be permitted to attend deposition of dfts experts (signed by Magistrate Judge Harry W. McKee) s/5-6-92 cc: attys on 5-8-92 (bhs)

5/20/92 Joint motion by Jill Brown, Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison to amend [19-1] Scheduling order (bhs)

5/21/92 Amended Scheduling order setting Deadline for filing of all pre-trial motions 5:00 7/1/92; Pla to file mo to amend by 5:00 6/1/92; Dft to file mo to amend by 5:00 6/15/92; Discovery cutoff 7/15/92; Pretrial order to be submitted on or before 5:00 8/3/92; Requested jury instructions by 5:00 8/3/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK, for Jill Brown Final Pretrial conference on 9:00 9/25/92; Jury trial on 9:00 10/5/92; (signed by Judge Paul Brown) cc: attys on 5-22-92 (bhs) [Entry date 05/22/92]

5/21/92 Terminated document #25 (bhs) [Entry date 05/22/92]

6/1/92 Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 06/02/92]

6/15/92 Notice of attorney appearance for Stacy Burns by Jack G Kennedy (bhs)

6/15/92 Motion by B J Moore, Robert Morrison to dismiss cross-claim (bhs)

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6/15/92 Motion by B J Moore, Stacy Burns, Robert Morrison for leave to file amended answer (bhs)

6/15/92 Notice by Jill Brown to take deposition of Oklahoma DPS on 6-24-92 at 11:45 am in Okla City, OK (bhs) [entry date 06/16/92]

6/15/92 Notice by Jill Brown to take deposition of Oklahoma State Bureau of Investigations on 6-24-92 at 12:15 am in Okla City, OK (bhs) [Entry date 06/16/92]

6/15/92 Notice by Jill Brown to take deposition of Okla Council of Law Enforcement Education and Training on 6-24-92 at 9:00 am in Okla City, OK (bhs) [Entry date 06/16/92]

6/19/92 Order granting [27-1] motion to amend [1-1] complaint, reset amend, join, implead parties by 5:00 6/24/92 (signed by Judge Paul Brown) cc: attys on 6-19-92 (bhs)

6/19/92 Order granting [30-1] motion for leave to file amended answer (signed by Judge Paul Brown) cc: attys on 6-19-92 (bhs)

6/22/92 Second Amended complaint by Jill Brown, (Answer due 7/2/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK) amending [1-1] complaint (bhs)

6/29/92 Second Amended Answer to Original Complaint by Bryan County, OK (bhs) [Entry date 06/30/92]

6/29/92 Amended Answer to Original Complaint by

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Stacy Burns: amends [8-1] answer (bhs) [Entry date 06/30/92]

6/29/92 Amended Answer to Original Complaint by B J Moore: amends [10-1] answer (bhs) [Entry date 06/30/92]

6/29/92 Second Amended Answer to Original Complaint by Robert Morrison: amends [10-1] answer (bhs) [Entry date 06/30/92]

7/1/92 Motion by Robert Morrison for summary judgment. (bhs) [Entry date 07/02/92]

7/1/92 Motion by B J Moore for summary judgment. (bhs) [Entry date 07/02/92]

7/1/92 Motion by Bryan County, OK for summary judgment. (bhs) [Entry date 07/02/92]

7/1/92 Motion by Stacy Burns for summary judgment. (bhs) [Entry date 07/02/92]

7/10/92 Order granting [29-1] motion to dismiss cross-claim filed by dfts Morrison and Moore agnst dft Burns in original answer (signed by Judge Paul Brown) s/7-9-92 cc: attys on 7-10-92 (bhs)

7/13/92 Motion by Jill Brown to extend time to respond to mo for summary jgm. Added attorney John Kermit Hill. (bhs) [Entry date 07/14/92]

7/13/92 Motion by Jill Brown to extend time to respond to mo for summary jgm of Board of Commissioners. (bhs) [Entry date 07/14/92]

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7/13/92 Motion by Jill Brown to extend time to respond to mo for summary jgm of Stacy Burns. (bhs) [Entry date 07/14/92]

7/13/92 Motion by Jill Brown to extend time to respond to mo for summary jgm of Robert Morrison. (bhs) [Entry date 07/14/92]

7/14/92 First supplement to Witness list filed by Jill Brown (bhs)

7/15/92 Order granting [46-1] motion to extend time to respond to mo for summary jgm, Response to motion reset to 8/12/92 for [42-1] motion for summary judgment (signed by Judge Paul Brown) cc: attys on 7-16-92 (bhs) [Entry date 07/16/92]

7/16/92 Order granting [48-1] motion to extend time to respond to mo for summary jgm of Stacy Burns, Response to motion to 8/12/92 for [44-1] motion for summary judgment (by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)

7/16/92 Order granting [47-1] motion to extend time to respond to mo for summary jgm of Board of Commissioners, Response to motion reset to 8/12/92 for [43-1] motion for summary judgment (signed by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)

7/16/92 Order granting [49-1] motion to extend time to respond to mo for summary jgm of Robert Morrison, Response to motion reset to 8/12/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)

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8/3/92	Joint Pretrial order filed (bhs) [Entry date 08/04/92]
8/3/92	Proposed Jury instruction by Jill Brown (bhs) [Entry date 08/04/92]
8/3/92	Proposed Jury instructions by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison (bhs) [Entry date 08/04/92]
8/12/92	Motion by Jill Brown to extend time to respond to B J Moore's mo for summary jgm. Added attorney John Delane Hill. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Stacy Burns's mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Bryan Cty Commissioners mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Robert Morrison's mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to continue trial (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [42-1] motion for summary judgment (bhs) [Entry date 08/13/92]

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8/12/92	Response by Jill Brown to [44-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [43-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [41-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/14/92	Order granting [58-1] motion to extend time to respond to B J Moore's mo for summary jgm, Response to motion reset to 8/22/92 for [42-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [59-1] motion to extend time to respond to Stacy Burns's mo for summary jgm, Response to motion reset to 8/22/92 for [44-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [60-1] motion to extend time to respond to Bryan Cty Commissioners mo for summary jgm, Response to motion reset to 8/22/92 for [43-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [61-1] motion to extend time to respond to Robert Morrison's mo for summary jgm, Response to motion reset to 8/22/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)

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8/24/92 Response by Jill Brown to [43-1] motion for summary judgment of Bryan County (bhs) [Entry date 08/25/92]

8/24/92 Response by Jill Brown to [41-1] motion for summary judgment of Robert Morrison (bhs) [Entry date 08/25/92]

8/24/92 Response by Jill Brown to [44-1] motion for summary judgment of Stacy Burns (bhs) [Entry date 08/25/92]

8/24/92 Response by Jill Brown to [42-1] motion for summary judgment of B J Moore (bhs) [Entry date 08/25/92]

9/4/92 Order granting [62-1] motion to continue trial, reset pretrial conference for 9:00 3/26/93, reset Jury trial for 9:00 4/12/93 (signed by Judge Paul Brown) s/9-3-92 cc: attys on 9-4-92 (bhs)

9/4/92 Order granting [63-1] motion to amend [1-1] complaint (signed by Judge Paul Brown) s/9-3-92 cc: attys on 9-4-92 (bhs)

9/9/92 Motion by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison for leave to file motion for reconsideration (bhs) [Entry date 09/10/92]

9/9/92 Amended complaint by Jill Brown, (Answer due 9/21/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK) amending [1-1] complaint (bhs) [Entry date 09/10/92]

9/21/92 Order granting [78-1] motion for leave to file

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motion for reconsideration (signed by Judge Paul Brown) cc: attys on 9-21-92 (bhs)

9/21/92 Motion by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Stacy Burns, Robert Morrison for reconsideration of [77-1] order (bhs)

11/2/92 Order granting [81-1] motion for reconsideration of [77-1] order, Response to motion, set notice of complaine due for 11/12/92 (signed by Judge Paul Brown) cc: attys on 11-3-92 (bhs) [Entry date 11/03/92]

11/9/92 Response by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison to [63-1] motion to amend [1-1] complaint (tm) [Entry date 11/10/92]

11/12/92 Order denying [81-1] motion for reconsideration of [77-1] order. Ct will consider dfts response for purposes of evaluating motions for summary judgment (signed by Judge Paul Brown) cc: attys on 11-12-92 (bhs)

11/13/92 Order that Ct will determine motions to summary judgment on or after 11-23-92 and set, Response to motion reset to 11/23/92 for [44-1] motion for summary judgment, reset to 11/23/92 for [43-1] motion for summary judgment, reset to 11/23/92 for [42-1] motion for summary judgment, reset to 11/23/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/11-12-92 cc: attys on 11-13-92 (bhs)

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11/20/92 Supplemental response in support of response to [42-1] motion for summary judgment of B J Moore by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of brief in opposition to [44-1] motion for summary judgment of Stacy Burns by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of brief in opposition to [42-1] motion for summary judgment of B J Moore by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of brief in opposition to [43-1] motion for summary judgment of Bryan County by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of brief in opposition to [41-1] motion for summary judgment of Robert Morrison by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of response to [41-1] motion for summary judgment of Robert Morrison by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

11/20/92 Supplemental response in support of response to [44-1] motion for summary judgment of Stacy Burns by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

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12/9/92 Order denying [44-1] motion for summary judgment, denying [43-1] motion for summary judgment, granting [42-1] motion for summary judgment, granting [41-1] motion for summary judgment and dismissing all claims against Robert Morrison and B J Moore; dismissing cruel punishment claim against Burns but 1983 claims for false arrest and false imprisonment and emotional distress are not dismissed; 1983 claims for inadequate hiring and training against Bryan County are not dismissed OB Ref: v66 p105 (signed by Judge Paul Brown) cc: attys on 12-10-92 (bhs) [Entry date 12/10/92]

12/11/92 Order dismissing intentional infliction of emotional distress claim OB Ref: v66 p111 (signed by Judge Paul Brown) s/12-10-92 cc: attys on 12-11-92 (bhs)

1/29/93 Motion by Jill Brown for leave to file supplemental responses to dfts interr and request for production of documents (bhs)

2/9/93 Order granting [95-1] motion for leave to file supplemental responses to dfts interr and request for production of documents (signed by Judge Paul Brown) cc: attys on 2-9-93 (bhs)

2/9/93 Fifth Supplemental Response by Jill Brown to dfts interrogatories (bhs)

2/9/93 Third supplemental Response by Jill Brown to dfts request for production of documents (bhs)

2/26/93 Motion by Jill Brown for leave to file plaintiff's second supplement to designation of expert witnesses (tm) [Entry date 03/01/93]

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2/26/93 Motion by Jill Brown for leave to file plaintiff's sixth supplemental response to deft's interrogatories (tm) [Entry date 03/01/93]

3/2/93 Order granting [99-1] motion for leave to file plaintiff's second supplement to designation of expert witnesses (signed by Judge Paul Brown) cc: attys on 3-3-93 (bhs) [Entry date 03/03/93]

3/2/93 Order granting [100-1] motion for leave to file plaintiff's sixth supplemental response to deft's interrogatories (signed by Judge Paul Brown) cc: attys on 3-3-93 (bhs) [Entry date 03/03/93]

3/2/93 Second supplement to designation of expert witnesses of pla (bhs) [Entry date 03/03/93]

3/2/93 Response by Jill Brown to sixth supplemental response to dfts interrogatories (bhs) [Entry date 03/03/93]

3/26/93 Motion by Stacy Burns, Bryan County, OK to amend [55-1] pre-trial order (bhs)

3/26/93 Pretrial order filed (signed by Judge Paul Brown) (bhs)

3/26/93 Final Pre-trial conference held, jury selection on April 12 as scheduled (sxh) [Entry date 03/29/93]

4/7/93 Response by Jill Brown to [105-1] motion to amend [55-1] pre-trial order (sxs) [Entry date 04/08/93]

4/8/93 Order denying [105-1] motion to amend [55-1]

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pre-trial order (signed by Judge Paul Brown) cc: attys on 4-12-93 (bhs) [Entry date 04/12/93]

4/12/93 Motion by Jill Brown in limine (sxh)

4/12/93 Motion by Robert Morrison, Stacy Burns, Bryan County, OK in limine (sxh)

4/12/93 Jury selection held (sxh)

4/12/93 Jury voir dire held before Judge Paul Brown (sxh)

4/12/93 Oral order granting [109-1] motion in limine granting [108-1] motion in limine from the bench signed by Judge Paul Brown (sxh) [Entry date 04/13/93]

4/12/93 Jury trial held — Day 1 (sxh) [Entry date 04/13/93]

4/13/93 Jury trial held — Day 2 — Pla rest, dft begins case in chief (sxh)

4/14/93 Jury trial held — Day 3. Parties close. (sxh)

4/14/93 Witness list filed by Jill Brown (sxh) [Edit date 04/20/93]

4/14/93 Exhibit list by Jill Brown (sxh) [Edit date 04/20/93]

4/14/93 Witness list filed by Stacy Burns, Bryan County, OK (sxh) [Edit date 04/20/93]

4/14/93 Exhibit list filed by Stacy Burns, Bryan County, OK (sxh) [Edit date 04/20/93]

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4/19/93 Jury note #1 filed (sxh) [Entry date 04/20/93]

4/19/93 Jury verdict for Jill Brown (sxh) [Entry date 04/20/93]

4/19/93 Minutes Re: [0-0] Jury trial by Judge Paul Brown on 4/12/93 through 4/19/93 (sxh) [Entry date 04/20/93]

5/7/93 Motion by Stacy Burns, Bryan County, OK for judgment notwithstanding the jury verdict (bhs)

5/7/93 Memorandum by Stacy Burns, Bryan County, OK in support of [117-1] motion for judgment notwithstanding the jury verdict (bhs)

5/17/93 Response by Jill Brown to [117-1] motion for judgment notwithstanding the jury verdict (bhs) [Entry date 05/18/93]

5/17/93 Memorandum by Jill Brown in support of [119-1] motion response (bhs) [Entry date 05/18/93]

6/20/93 Partial Transcript filed of trial on April 13, 1993 before Judge Paul Brown (sxs) [Entry date 06/23/93]

7/21/93 Transcript filed (6 Volumes) of trial 4-12-93 thru 4-19-93 (bhs)

9/21/93 Order granting in part, denying in part [117-1] motion for judgment notwithstanding the jury verdict and pla should recover nothing for loss of income OB Ref: v69 p104 (signed by Judge Paul Brown) s/9-20-93 cc: attys on 9-22-93 (bhs) [Entry date 09/22/93]

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9/21/93 Judgment on jury verdict for Jill Brown against Stacy Burns, Bryan County, and pla to recover \$711,302 actual damages and \$65,000. attys fees and \$20,000 punitive damages OK. OB Ref: v69 p105 (signed by Judge Paul Brown) s/9-20-93 cc: attys on 9-22-93 (bhs) [Entry date 09/22/93]

9/22/93 Case closed (bhs)

10/4/93 Post judgment motions under rules 50 and 56 of Bryan County and Stacy Burns (bhs) [Entry date 10/05/93]

10/4/93 Notice of appeal by Stacy Burns, Bryan County, OK Fee Status: pd (notice of appeal and docket sheet sent to Fifth Circuit) Appeal record due on 11/3/93 (bhs) [Entry date 10/05/93]

10/4/93 Motion by Stacy Burns, Bryan County, OK to stay pending disposition of motions after entry of judgment (bhs) [Entry date 10/05/93]

10/4/93 Motion by Stacy Burns, Bryan County, OK to stay pending appeal (bhs) [Entry date 10/05/93]

10/5/93 USCA appeal fee: \$105.00 #60377 [126-1] appeal (bhs)

10/14/93 Response by Jill Brown to [128-1] motion to stay pending appeal, [127-1] motion to stay pending disposition of motions after entry of judgment (bhs) [Entry date 10/15/93]

10/14/93 Notice of appeal by Jill Brown Fee Status: pd (notice of appeal and docket sheet sent to Fifth

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Circuit) Appeal record due on 11/15/93 (bhs)
[Entry date 10/15/93]

10/14/93 USCA appeal fee: \$105.00 #60399 [130-1]
appeal (bhs) [Entry date 10/15/93]

10/20/93 Notice of Docketing ROA from USCA Re: 126-
1] appeal USCA NUMBER: 93-5376 (bhs)

10/27/93 Order denying [125-1] post-judgment motions
under Rules 50 and 59 (signed by Judge Paul
Brown) s/10-26-93 cc: attys on 10-27-93 (bhs)

10/28/93 Certified and transmitted record on appeal to
U.S. Court of Appeals: [130-1] appeal, [126-1]
appeal (bhs)

10/28/93 Terminated document (bhs)

Separately marked instruments included in
record on appeal No I thru III

Transcripts No IV thru X

1 Folder of exhibits

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**ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN
DIVISION FILED DECEMBER 9, 1992**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

4:91cv229

JILL BROWN

Plaintiff

v.

STACY BURNS, ROBERT MORRISON, B.J. MOORE, THE
BOARD OF THE COUNTY COMMISSIONERS OF BRYAN
COUNTY,

Defendants.

ORDER

On this day came on for consideration Defendants' Motion for Summary Judgment,¹ and the Court having considered the same and the response, is of the opinion that 1) all the claims against Robert Morrison should be dismissed; 2) that all claims against Sheriff B.J. Moore should be dismissed; 3) that the cruel and unusual punishment claim against Stacy Burns should be dismissed; 4) that the § 1983 claims for false arrest and excessive

1. Each of the remaining defendants (Stacy Burns, Robert Morrison, B.J. Moore, and the Board of the County Commissioners of Bryan County) filed its own motion for summary judgment.

force against Stacy Burns in his individual capacity should not be dismissed; 5) that the false imprisonment, negligence, and intentional infliction of emotional distress claims against Stacy Burns in his official capacity should not be dismissed; 6) that the § 1983 municipal liability claim for inadequate hiring and training against Bryan County should not be dismissed; and 7) that the common law negligent hiring and negligent training claims against Bryan County should not be dismissed.²

Introduction

Plaintiff Jill Brown ("Brown") brought this action against Reserve Deputy Sheriff Stacy Burns³ ("Burns"), Deputy Sheriff Robert Morrison ("Morrison"), Sheriff B.J. Moore ("Moore"), and the Board of the County Commissioners of Bryan County ("Bryan County") alleging a § 1983 action for excessive force, false arrest, and for cruel and unusual punishment under the Eighth Amendment. Plaintiff also brought common law actions for intentional infliction of emotional distress, false imprisonment, and negligence. Plaintiff also asserted a § 1983 action against Bryan County and Sheriff Moore in his official capacity for inadequate training. On February 25, 1992, this Court dismissed Bryan County Sheriff's Department from the suit entirely, as well as the state law actions against Morrison and Moore.

This case stems from an incident that occurred on May 12, 1991 between Jill Brown and Bryan County deputy sheriffs at approximately 1:30 a.m. Bryan County deputy sheriffs had set up a checkpoint just north of the Denison Dam to monitor drunk

2. For purposes of this motion, the Court examined plaintiff's third amended complaint.

3. Stacy Burns' uncle is Sheriff B.J. Moore.

driving. Deputy Sheriff Robert Morrison observed a pick-up truck driven by Todd Brown, the husband of the plaintiff, approach the checkpoint. Plaintiff Jill Brown was in the pick-up truck as a passenger. Upon seeing the checkpoint, Todd Brown turned the pick-up around and proceeded back across the dam.⁴

Deputy Sheriff Robert Morrison ran to his vehicle to pursue the pick-up. Stacy Burns, a reserve deputy sheriff authorized by Sheriff Moore to ride in patrol cars and make arrests, got into Morrison's car to assist. Both Morrison and Burns testified that they turned on the siren and flashing lights and pursued the pick-up at high speeds approaching one hundred miles per hour as it proceeded across the dam, the spillway, and toward Eisenhower Park. Todd Brown contends that he was not speeding, that he mistakenly ignored the flashing lights⁵ because he did not believe he was being pursued, and that once he noticed he was being pursued, he slowed down, signaled, and then stopped a short distance from Eisenhower Park.

Jill Brown contends that after their pick-up truck stopped, she obeyed the orders of the officers. She contends that she raised her hands,⁶ unlocked the door, and began to get out of the pick-up truck. According to the plaintiff, Burns then opened the door more fully, and threw her to the ground by twisting her arm behind her back. Brown contends Burns injured her knees in

4. It is disputed whether Todd Brown did this in a sudden and reckless manner. Under Oklahoma law, it is not unlawful to turn around prior to reaching a checkpoint.

5. Todd Brown contends that the siren was not on.

6. Morrison and Burns contend that Jill and Todd Brown ignored their instructions at first, that Todd Brown resisted the placing of handcuffs on him, and that Jill Brown only came out after Burns approached the window and attempted to open the door. Burns denies using excessive force.

throwing her to the ground face first. The plaintiff also contends that Burns subsequently removed her from the ground by jerking the chain between her handcuffs when her hands were handcuffed behind her back and jerking her to her feet.

After the initial seizure, it is undisputed that Burns moved Jill Brown to the rear of the pick-up next to her husband where they remained handcuffed while Morrison searched the pick-up. He found a loaded rifle, an unloaded pistol, and a beer can in the pick-up truck. During this period of time, Morrison used his radio to run a check on the vehicle registration, the driver's license of Todd Brown, and to determine if any warrants against either occupant were in existence. He found that Todd Brown was driving with a suspended driver's license. Morrison issued five tickets to Todd Brown for various traffic offenses. Jill Brown did not receive a ticket and was released after approximately one hour.

Sheriff B.J. Moore was not at the checkpoint and did not participate in the incident. However, Moore authorized such checkpoints.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprise v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct.

2548, 2554 (1986). The moving party satisfies the burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment will be appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986)(citations omitted).

Discussion

Burns and Morrison's Liability

Burns and Morrison raise qualified immunity as their defense. Once a qualified immunity defense is raised, the plaintiff must show that defendant violated clearly established federal law. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S.Ct. 3034 (1987).

The right to be free from excessive police force should be analyzed under the Fourth Amendment's objective reasonableness standard rather than under a substantive due process standard. *Graham v. Connor*, 109 S.Ct. 1865, 1867 (1989). The calculus of reasonableness must include allowance for the fact that officers must make split-second decisions.

Graham, 109 S.Ct. at 1872. Furthermore, the right to make an investigatory stop necessarily entails the right to use some degree of physical force. *Graham*, 109 S.Ct. at 1871. Finally, the Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested. *Hill v. California*, 91 S.Ct. 1106, 1110 (1971).

Although the excessive force analysis requires evaluating the claim based on the totality of the circumstances, *Graham* identified three factors in particular: 1) the severity of the crime; 2) whether the suspect poses an immediate threat to the officers or others; and 3) whether the suspect is actively resisting or attempting to evade arrest by flight. In this case, the crimes at issue were traffic offenses. Second, according to the plaintiff, she raised her hands, unlocked the door, and did not resist arrest in any other manner. Third, according to Todd Brown, as soon as he realized that the police were pursuing him, he soon slowed down, signaled, and parked on the left side of the road. Finally, according to the plaintiff, she was not resisting or evading arrest. Thus, the Court finds that a material fact issue exists with respect to the excessive force claim against Burns.

However, the excessive force and false arrest claims against Morrison should be dismissed. It is undisputed that Morrison did not apply force to the plaintiff. Thus, he cannot be liable under § 1983 for an excessive force claim. *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990). Furthermore, although a police officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in his presence by other officers, *O'Neil v. Krzeminski*, 839 F.2d 9 (2nd Cir. 1988), Morrison was on the driver's side of the truck apprehending Todd Brown and did not have time to intervene. There is no evidence to suggest that Morrison stood by and became a tacit collaborator in Burns' actions. *O'Neil*, 839 F.2d at 12. The excessive force and false arrest claims against Morrison should be dismissed.

With respect to the false arrest claim against Burns, he contends that he had probable cause to arrest the plaintiff. Probable cause is a defense to false arrest claims. *Gerstein v. Pugh*, 95 S.Ct. 854, 866 (1975); *McConney v. City of Houston*, 863 F.2d 1180, 1184-85 (5th Cir. 1989) (holding that a person may be constitutionally detained for at least four or five hours following a lawful warrantless arrest for public intoxication). A police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 278 (5th Cir. 1992) (citing *Gladden v. Roach*, 864 F.2d 1196 (5th Cir. 1989), *cert. denied*, 109 S.Ct. 3192 (1989)).

In this instance, Brown was merely a passenger and, according to her, did not attempt to escape or resist arrest. Although she was handcuffed for approximately one hour, she was not charged with any offense. The Court concludes that a material fact issue exists as to whether there was probable cause for the arrest. Plaintiff's federal claim for false arrest and the state claim of false imprisonment against Burns should not be dismissed.

Finally, plaintiff has alleged an Eighth Amendment violation for cruel and unusual punishment. Such a cause of action requires a formal adjudication of guilt for a valid claim to arise. *Bell v. Wolfish*, 99 S.Ct. 1861, 1872 n.16 (1979). There was no adjudication at the time of the incident and thus this cause of action should be dismissed.

With respect to the state law claims for negligence, false imprisonment, and intentional infliction of emotional distress, Burns claims that he is not liable under the Oklahoma Tort Claims Act ("the Act"). 51 O.S.A. § 151 *et seq.* It is clear that

Burns is an "employee" under the Act⁷ as Burns had Moore's authorization to work the checkpoints. Sections 152.1 of the Act waives the doctrine of sovereign immunity. However, Section 153 of the Act provides in relevant part: "The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise." Thus, the state law claims survive against the County and not against Burns individually.⁸

The Liability of Bryan County and Sheriff Moore

In *Monell v. Department of Social Services*, 98 S.Ct. 2018 (1978), the Supreme Court held that a municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official government policy. The Supreme Court has subsequently recognized a § 1983 action under *Monell* for failure to train. See *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205-06 (1989). The Fifth Circuit, however, has cautioned that to make a showing of inadequate training against a municipality, there has to be some evidence of a pattern of similar incidents in which citizens were injured, *Leatherman v. Tarrant County Narcotics Intelligence*, 954 F.2d 1054, 1058 (5th Cir. 1992), *cert. granted*, 112 S.Ct. 2989 (U.S. June 29, 1992), unless there was proof that the incident was caused by an existing, unconstitutional municipal policy. *City of Oklahoma City v. Tuttle*, 105 S.Ct.

7. The Oklahoma Torts Claims Act defines an "employee" to mean "any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis." 51 O.S.A. § 152.5.

8. Burns was acting within the "scope of [his] employment" as that term is defined under the Act because Burns was performing tasks lawfully assigned by Moore. See 51 Ok.St. Ann. § 152(9).

2427, 2436-37 (1985). There has been no showing of other incidents of excessive force by Burns while serving as a reserve deputy sheriff. Thus, a failure to train cause of action can only yield municipal liability "where the county's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." *City of Canton*, 109 S.Ct. at 1206.

In evaluating whether a municipal policy is unconstitutional, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform. *Id.* at 1206-07. Plaintiff has alleged that Sheriff Moore, acting on behalf of the County, had a policy of allowing untrained and unqualified reserve deputies to serve in law enforcement activities and make arrests. Under this policy, Burns was provided a uniform and badge and could make arrests, but could not carry a gun or operate patrol cars. Moore required all deputy sheriffs to be certified through the Council on Law Enforcement, Education, and Training (CLEET).⁹ However, Burns was not certified through CLEET and did not receive any additional training from the County. The Plaintiff also put forward evidence that Burns had a conviction for assault and battery stemming from a January 4, 1990 incident. Burn's lack of training and his alleged propensity for violence raise a material fact issue as to whether Moore, acting on behalf of the County, displayed deliberate indifference.¹⁰ Thus, Plaintiff's § 1983

9. Under Oklahoma law, CLEET exercises authority over the training and certification of all police officers, is the school where all Oklahoma officers are trained, and is vested with the responsibility of certifying that Oklahoma police officers satisfactorily complete the basic police course offered by them. See *Meade v. Grubbs*, 841 F.2d 1512, 1529 (10th Cir. 1988).

10. See *City of Canton*, 109 S.Ct. at 1205-06 ("[I]t may happen that in light of the duties assigned to specific officers . . . the need for more or adequate training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can be said to represent a policy for which the city is responsible . . .").

action for inadequate hiring and training against Bryan County should not be dismissed.¹¹

Plaintiff's common law actions for negligent hiring and negligent training against the County should also not be dismissed. *See* 51 Okl. St. Ann. § 153.

Section 163 of the Governmental Tort Claims Act requires that all suits name as the defendant the state or political subdivision. "In no instance shall an employee of the . . . political subdivision acting within the scope of employment be named as a defendant. . . ." 51 Okl. St. Ann. § 163. Thus, all claims against Sheriff B.J. Moore should be dismissed.

Summary

The Court concludes that 1) all the claims against Robert Morrison should be dismissed; 2) that all claims against Sheriff B.J. Moore should be dismissed; 3) that the cruel and unusual punishment claim against Stacy Burns should be dismissed; 4) that the § 1983 claims for false arrest and excessive force against Stacy Burns in his individual capacity should not be dismissed; 5) that the false imprisonment, negligence, and intentional infliction of emotional distress claims against Stacy Burns in his official capacity should not be dismissed; 6) that the § 1983 municipal liability claim for inadequate hiring and training against Bryan County should not be dismissed; and 7) that the common law negligent hiring and negligent training claims against Bryan County should not be dismissed.

11. Bryan County contends that it is not liable for the actions of Sheriff Moore. However, Oklahoma law prescribes the precise manner in which a party may sue a county. 19 O.S.A. 4. Plaintiff has complied with this requirement. Furthermore, this Court previously dismissed the Bryan County Sheriff's Department as an improper party.

It is so ORDERED.

Signed this 9th day of December, 1992.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld 12-10-92 to: *Ellis*
Hill
Sheridan
Kennedy

EXCERPTED STIPULATION

* * *

2. The incidents made the basis of this incident occurred in Grayson County, Texas and within the Eastern District of Texas.

3. The venue is proper pursuant to 28 U.S.C. § 1391(b) and (e).

4. At all times relevant hereto, Defendant Morrison was a Bryan County Deputy.

5. At all times relevant hereto, Defendant Morrison was acting as a deputy for Bryan County.

6. At all times relevant hereto, Defendant Moore was duly elected and acting Sheriff of Bryan County, Oklahoma.

7. At all times relevant hereto, Defendant Moore was the policy maker for Bryan County regarding the Sheriff's Department.

8. Defendant Bryan County is a subdivision of the State of Oklahoma.

9. At all times relevant hereto, Defendants Burns, Morrison, Moore, and Bryan County Sheriff's Department were acting under the color of law and pursuant to their authority as police personnel.

10. At approximately 1:30 a.m. on May 12, 1991, Defendants Burns and Morrison and other personnel from the Bryan County Sheriff's Department set up a checkpoint roadblock on the south side of the City of Cartwright, Oklahoma, just north of Denison Dam.

11. At approximately 1:30 a.m. on May 12, 1991, a vehicle driven by Rodney Todd Brown approached the checkpoint roadblock from the south having just crossed Denison Dam and being

* * *

Contested Issues of Fact

57. Whether the actions of Morrison were in accordance with proper law enforcement procedures.

58. Whether the actions of Burns were in accordance with proper law enforcement procedures.

59. Whether the sole producing cause of Jill Brown's injuries and damages, if any, was her own negligence.

60. Whether Burns is an employee of the office of Sheriff of Bryan County.

61. Whether the acts complained of violated any custom, policy, procedure, ordinance, statute or law.

Contested Issues of Law

1. Whether Defendant Board of County Commissioners of Bryan County is entitled to qualified immunity.

2. Whether Defendant B.J. Moore is entitled to qualified immunity.

3. Whether Defendant Robert Morrison is entitled to qualified immunity.

4. Whether Defendant Stacy Burns is entitled to qualified immunity.

5. Whether Defendant Board of County Commissioners is liable under 42 U.S.C. § 1983 when they did not participate in any policy decisions with regards to the conduct and operation of the office of Bryan County Sheriff.

6. Whether Defendant Board of County Commissioners is liable under state law for the acts complained of when they did not participate in any policy decisions with regards to the conduct and operation of the office of Bryan County Sheriff.

* * *

**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS —
RE: OKLAHOMA HIRING STANDARDS**

[Commencing at page 290]

Limine that Mr. Kennedy filed regarding Stacy Burns' past criminal history, arrest record, conviction record, that type of thing.

MR. JACK KENNEDY: What is your request?

MR. WALKER: It's in regards to your Motion in Limine. I believe the Court has granted it for the purposes of — that he wanted to bring that information up outside the presence of the jury prior to putting in on from a witness on the stand.

Our next witness will be a law enforcement expert who we believe will be prepared to give the opinion that it was negligent of Bryan County and B. J. Moore to hire Stacy Burns in this case based upon his past criminal history.

THE COURT: Well, is that based on arrests and convictions both or convictions?

MR. WALKER: It's based upon both, Your Honor. I think our expert, Dr. Schweizer, will testify that when you see a criminal history of the nature that Mr. Burns has, a reasonably prudent law enforcement officer, prior to hiring him, would go back and do a check on the arrest, to make sure what the disposition of those were. And I think there's going to be some things that would have been found out had that check been done. And it's not time-consuming. It's not costly. It's something that's easily done and any reasonably prudent sheriff would have done. And that's in regards to [291] our negligent hiring claim, Your Honor.

I think he will testify, and he's been a police chief and he's been a police officer and he's certified in several states and he'll testify that a reasonably prudent sheriff's officer, prior to hiring someone with that type of history, would take that into consideration and would do a background check as to what was the disposition of those arrests, both arrests and convictions.

MR. JACK KENNEDY: Of course, we would object to any charge that, no conviction, or any arrest of which there's no conviction, because it is assuming somebody is guilty of something when there's nothing more than a document or something that occurred at sometime in the past. We have no objection to his referring to what he had been convicted of, and we've more or less stipulated as to what that is. But as to other matters, he doesn't know if he was arrested or what the facts or situations were because there has been no other conviction.

MR. WALKER: Your Honor, under 404(b), we're not putting this evidence in to show Mr. Burns' character.

THE COURT: I understand. It's for a very specific purpose of whether or not the Sheriff should have investigated further. I understand why you're offering it.

MR. WALKER: Your Honor, I believe the records will show that some of these arrests, prior arrests of Mr. Burns [292] would include resisting the arrest of an officer. Several arrests for assault and battery, public intoxication, and presenting a false I.D. to a police officer. We believe all those are relevant to showing the Sheriff's negligence in not investigating and determining the situation in regards those prior to hiring Stacy Burns.

THE COURT: Let me see that — do you have a wrap sheet? Is that what you're —

MR. WALKER: Yes, Your Honor.

Additionally, Your Honor, there are arrests and convictions that are not even evidence on that record but that we believe should have led a reasonable prudent officer to make further inquiry as to the background of Stacy Burns prior to giving him a badge and putting him on the streets.

Your Honor, might I make one other point? I believe the record will also show that while Stacy Burns was on probation for one offense, that he committed several other offenses in violation of his probation. Those did not result necessarily in convictions, but they did result in violations of his probation, and we believe for that additional purpose, they show that Sheriff Moore is negligent in hiring Stacy Burns.

MR. JACK KENNEDY: Your Honor, may I respond?

THE COURT: Yes.

MR. JACK KENNEDY: The law of Oklahoma is very [293] clear at what the obligations of the Sheriff are. If this man had been convicted of a felony or a crime involving moral turpitude and is under 21 years of age, he is not eligible to be enrolled in the academy or become an officer. None of these conditions exist in this case. Now, this man may have an opinion, but he's going against the state law. And so he's offering, very prejudicially, items which have no bearing whatsoever on the laws that will be given to the Court. 70, the Title 70, Section 3311, sets out specifically what a sheriff is required to do.

MR. WALKER: Those are the minimum requirements, Your Honor. And I believe the record will additionally show, if we're allowed to get into it.

THE COURT: Now, what did you say, Mr. Walker? I didn't — you said those are what?

MR. WALKER: Those are the minimum requirements. That doesn't preclude a sheriff from taking other steps that a reasonably prudent sheriff would in determining whether or not they should hire someone as a police officer.

Additionally, I believe we're going to have evidence that there was a warrant out on the day of this incident for Stacy Burns' arrest. I believe that's appropriate and should be placed into evidence.

THE COURT: Do you have a copy of the Oklahoma statute that you referred to?

[294] MR. JACK KENNEDY: Yes. I have given that to the Clerk as one of my exhibits, Title 70 — did I give you a list of my exhibits?

If I may have one moment, Your Honor?

I believe Section D(2) at the bottom of the second page, Your Honor, is the portion of which I'm referring.

THE COURT: Well, the Court is of the opinion that this evidence is relevant to the issue of whether or not the Sheriff was negligent and that its probative value — it's obviously prejudicial, but it's probative value outweighs any unfair prejudice, and the Court is going to admit it for that purpose.

MR. JACK KENNEDY: Do I understand the Court will admit all charges, whether or not they've been convictions or not?

THE COURT: I think as to whether or not — I think it's a different issue than impeachment or character. It just goes to the matter of whether or not he was negligent and I'm going to admit it for that purpose.

MR. JACK KENNEDY: If I may make my objection, then, Your Honor —

THE COURT: You certainly may. You may make it now.

MR. JACK KENNEDY: If I might, Your Honor, before the jury comes in —

[295] THE COURT: I understand.

MR. JACK KENNEDY: The Defendant objects to the introduction of any such testimony as to the opinion of the expert that would require the Sheriff to do something that is not the recognized standards of law of the State of Oklahoma. That it is so prejudicial to offer testimony of charges and not convictions when no law requires the Sheriff to do that, which this expert apparently will testify.

The evidence will not be offered to show the gross negligence or conscious indifference as required by *Langerand* and the *City of Oklahoma vs. Tuttle*, and will not be shown to be a proximate cause of the incident which occurred on May 11th or 12th, 1991. That the prejudicial effect of this would overcome any possible ability of the Defendant to overcome the opinion based upon requirements of the Sheriff that is not required by the law under which he is required to operate, to-wit, Title 70, Section 3311 of the Oklahoma statutes, as promulgated by the Legislature.

Further, Your Honor, it is an attempt, in violation of the

Supreme Court's edict in the City of *Oklahoma vs. Tuttle* to show one single incident to establish a custom policy when the Courts have consistently, with *Rodriguez, Langerand* and *City of Oklahoma vs. Tuttle* said that that is not sufficient evidence to allow the showing of a custom. To show that he only did it as to this one young man and not to [296] show that that was his practice would allow the Court and the jury to consider a single incident as being the grounds of a custom. Otherwise, there's no reason for this evidence to be tendered to the jury at all. He has to show a custom practice by the Sheriff, not as to this one person, but that it was practiced throughout his department and acquiesced in by the policymaker or the county.

THE COURT: All right. Thank you, Mr. Kennedy.

Anything else before we bring the jury in?

MR. WALKER: Your Honor, may we approach, just briefly? May we approach, just briefly?

THE COURT: All right.

(A side bar discussion was had between the Court, Counsel for the Plaintiff and Counsel for the Defendants, out of the hearing and presence of the jury as follows:)

MR. JACK KENNEDY: Your Honor, for purposes of the record, may we have a running objection to this testimony?

THE COURT: The Court will consider that you timely objected to any evidence as to arrests and not convictions that the expert testifies about.

MR. JACK KENNEDY: Thank you.

(The following occurred in the hearing and presence of the jury as follows:)

(Jury entered the courtroom at 10:40 a.m.)

THE COURT: You may be seated.

**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS —
SCHWEITZER TESTIMONY**

[Commencing at page 317]

THE COURT: Well, sustained.

BY MR. WALKER:

Q. You mentioned convictions of Stacy Burns prior to May the 12th of 1991. A. Yes.

Q. Your review of the documentation, what type of convictions, how many and what type of convictions did Stacy Burns have prior to May the 12th, 1991?

THE COURT: Now, just a minute. Now, members of the jury, I'm going to allow this witness to answer that question and admit this evidence for a limited purpose. The limited purpose is that you may consider it so far as you want or desire to consider it in determining whether the Sheriff of Bryan County acted properly in allowing Stacy Burns to serve as a reserve deputy sheriff. You are not to consider it in determining whether Stacy Burns did or did not do a particular act on May the 12th, 1991, the date of this incident.

You may proceed.

BY MR. WALKER:

Q. Dr. Schweitzer, you mentioned certain convictions that you found in the documentation that you reviewed relating to Stacy Burns. Would you describe for the jury the number and

nature of those convictions? A. Yes. There were nine convictions for moving traffic [318] violations. One for assault in battery. One for having a false I.D. in possession. One for public drunk. One for expired tags, which means failure to pay the taxes. One for driving under suspension and one for driving under the influence of alcohol.

Q. Additionally, did the documentation uncover additional — strike that.

Do you have an opinion as to whether or not the, not only the conviction record but the arrest record of an individual should be investigated by a reasonably prudent law enforcement officer prior to selecting that person as a reserve deputy? A. Yes, it should be and I've seen many applications where it specifically asks for prior arrest record, not only convictions.

Q. The convictions that you've enumerated for us, did you also find additional charges, arrest charges against Stacy Burns?

A. Well, I found a document which indicated that a warrant was issued for a probation violation.

Q. All right. A. And that warrant was valid apparently at the time he was hired by Bryan County.

Q. I'm not sure I understand that. Stacy Burns was on probation? [319] A. Yes, for the driving under the influence of alcohol and failed to meet the conditions of probation and a warrant was issued for his arrest which — which I believe was valid the time I was hired by Bryan County.

Q. Was that arrest also valid on May the 12th of 1991? A. Yes, it was.

Q. Was — are you saying, then, that Stacy Burns was on a probation for a criminal violation on May the 12th of 1991? A. Yes.

Q. And that he was in violation of that probation and an arrest warrant had been issued? A. Yes.

Q. The conditions —

THE COURT: Now, members of the jury, the limiting instruction that I gave you previously also pertains to the testimony that the witness has just given.

BY MR. WALKER:

Q. You mentioned that there were violations of that probation prior to May the 12th of 1991. What were those violations? A. This listed for the order revoking the probation, mentioned that failure to perform community service and the fact that he failed to pay fines. You asked me about the conditions of probation? The conditions of probation that you not violate any state — federal, state or local criminal [320] laws, and that you not consume alcoholic beverages —

MR. JACK KENNEDY: Your Honor —

THE COURT: Just a minute.

MR. JACK KENNEDY: I don't think that's responsive, the last part of the answer.

THE COURT: Sustained.

BY MR. WALKER:

Q. Did your investigation uncover violations by Stacy Burns of his probation conditions? A. Yes.

Q. And which probation conditions did you find that Stacy Burns had violated? A. Well, he was arrested and convicted of public drunk during that time he was on probation.

Q. The assault and battery, was that during the —
A. Assault and batter also occurred during the time of his probation.

Q. The false I.D.? A. Yes.

Q. One of the DWLS's? A. Yes.

Q. Driving while license suspended? A. Yes.

Q. Based upon the testimony and documentations that you've reviewed, do you have an opinion as to whether or not on May [321] the 12th, 1991, Stacy Burns had the potential for a disposition to be physically aggressive such that would disqualify him from becoming a sheriff's reserve? A. Yes, I do.

Q. And what is that opinion? A. I believe he has such a disposition —

Q. And — A. — based on what was enumerated.

Q. All right. Did you find an additional arrest record of Stacy Burns regarding a charge of resisting arrest? A. Yes, there was a record or a charge of resisting an officer. That's correct.

Q. Did you also review Stacy Burns' deposition? A. Yes, I have.

Q. And based upon his deposition, do you have an opinion as to whether or not Stacy Burns had the potential for a predisposition to being physically aggressive such that would disqualify him from becoming a law enforcement officer?

MR. JACK KENNEDY: Your Honor, I would object to him making an opinion based upon matters not in evidence, the deposition of Stacy Burns, of which we don't know to what he's referring.

THE COURT: Overruled.

BY MR. WALKER:

Q. Do you have an opinion? A. Could you repeat the question? Does that involve him being hired or what he's done after he was hired or what?

THE COURT: Re-ask your question, Mr. Walker.

BY MR. WALKER:

Q. In reviewing Stacy Burns' deposition, did you find testimony, sworn testimony from Stacy Burns regarding the number of arrests he had made prior to May the 12th, 1991? A. Yes.

Q. And what was that number? A. He indicated he had made approximately a dozen, 12 arrests.

Q. And did you find sworn testimony by Stacy Burns in that deposition as to how often during those 12 arrests that he felt it was necessary to have to take someone to the ground in effecting that arrest?

MR. JACK KENNEDY: Your Honor, he's referring to —

it's hearsay to the Court and the jury and I would object to the testimony based on something that's not in evidence, to wit, whatever his answers may be.

MR. WALKER: Your Honor, it's sworn testimony by a party.

THE COURT: Well, I understand that, sustain that. I'm going to sustain that objection.

BY MR. WALKER:

Q. In reviewing all the documentation, including the [323] deposition testimony of Sheriff B. J. Moore, did Sheriff Moore have in place on May the 12th, 1991 any written criteria regarding personnel selection? A. I did not find any evidence of that.

Q. In reviewing the deposition of expert witnesses designated by the Defense, particularly Bob Wallace, did you find any, that they had any policy at all in regards to hiring or why they didn't have? A. A policy of flexibility meaning no specific rules, to have maximum flexibility.

Q. Maximum flexibility to do what? A. Well, without any rules, you would have maximum flexibility to hire anyone, regardless whether they're qualified or not.

Q. When B. J. Moore selected Stacy Burns as a law enforcement reserve, did he check — had he checked Stacy Burns' criminal history? A. There's indication in the records that would show that, in fact, he did check the criminal history of Stacy Burns.

Q. And what documentation is that? A. It's a printout

from the Oklahoma State Bureau of Investigation which keeps a record of any time an inquiry is made for a specific reason of a criminal record, when fingerprints are submitted, et cetera. And it lists here or indicates that on the 8th of May, 1991, an inquiry was made [324] from Bryan County, reference Stacy Burns as a police applicant. So that would mean an inquiry regarding Stacy Burns' criminal history.

Q. And when was that inquiry made? A. On the 8th of May.

Q. Four days before the incident that we're here about? A. Yes.

Q. Why is it important for law enforcement personnel who are the head of their particular agency to be careful in who they select or hire? A. It's important because those people are in a position of trust and responsibility and those people, if you're not careful in the hiring selection, you don't know whether that person has — is likely to abuse the public, whether they'll even perform their job or duties properly. You may hire an individual that uses excessive force, that disregards people's individual rights. You have to ascertain, as I stated earlier, all these other personality characteristics to ensure that they properly perform their duties. It's a position of public trust.

Q. At the time B. J. Moore made the decision to hire Stacy Burns, did Stacy Burns have any experience in law enforcement? A. Not that was indicated in the depositions.

Q. At the time B. J. Moore made the decision to hire Stacy [325] Burns, at that time, did Stacy Burns have any training in law enforcement? A. There was some indication that he had begun to attend the C.L.E.E.T. Academy, but from what I understand, he had not attended more than perhaps a few days or a week or two.

Q. From your review of the documentation, including the deposition of B. J. Moore and Bob Wallace and Stacy Burns, did Bryan County, through B. J. Moore, provide any legal or any local training to Stacy Burns prior to authorizing Stacy Burns to go out and make forcible arrests? A. No, they did not.

Q. Did Bryan County provide any local training to Robert Morrison or any other deputy on how to work with inexperienced reserve deputies? A. Based on the depositions that I have read, I would say no.

Q. On the night — based upon — you've read the depositions of Officer Morrison and Mr. Burns, is that correct? A. Yes, that's correct.

Q. The two primary officers that were involved in the stop of Todd and Jill Brown? A. Yes.

Q. Based upon their depositions and the depositions of B. J. Moore, on the night of May the 12th, 1991, who was in

* * *

[359] A. No, that's not correct.

Q. Are you satisfied that Title 70, Section 3311 sets out the standards by which officers are to be trained and certified in the State of Oklahoma? A. Are you allowing me to qualify my answer?

Q. First, have you got an answer? If you don't — A. It sets out those standards in that fashion, yes.

Q. All right. And did the sheriff of Bryan County comply with the laws of the State of Oklahoma and in particular, Title 70,

Section 3311 through 3314 in the employment of his deputy sheriffs? A. Yes.

Q. Sir? A. What was the question again? Was there one?

Q. Did the sheriff of Bryan County, Oklahoma comply with the applicable standards of law in the hiring of the deputies that were employed at and in Bryan County in May of 1991? A. Yes, I would say so.

Q. So what you are telling the jury is that even though the sheriff complied with the law, you think he should do more? A. Absolutely.

Q. And your opinion is your opinion and not the opinion of the Oklahoma Legislature, is it?

MR. WALKER: Your Honor, we're going to object as to what the opinion of the Oklahoma Legislature is. I [360] believe it calls for a legal conclusion and speculation.

THE COURT: Well, I think it's argumentative. I'll sustain the objection.

BY MR. JACK KENNEDY:

Q. I'll put it this way: You have no law to support your opinion? A. Not —

Q. Yes or no. A. What I'm supporting my opinion with is the fact that those training standards are not —

MR. JACK KENNEDY: I object to not being responsive. Please? I object to him not being responsive. I asked him if he had any law that would support his opinion.

THE COURT: Well, sustain the objection. Listen to the question, answer it if you can.

BY MR. JACK KENNEDY:

Q. Do you have any law to support the opinion that you've given the jury this morning as to the training standards of the State of Oklahoma that will support your opinion? A. No Oklahoma law.

Q. All right. You have been critical of Stacy Burns. Please tell the jury exactly what law that the Bryan County Sheriff violated in allowing him to be a reserve deputy or to work with another officer.

MR. WALKER: Your Honor, we would object to the [361] question. The standard is not whether Sheriff Moore violated the law but whether or not his hiring of Stacy Burns and training of he and Robert Morrison was negligent, not that he violated the law.

THE COURT: Sustained.

BY MR. JACK KENNEDY:

Q. Or do you have any law that Sheriff Moore has violated in any of the incidents about this — A. Yes, I do.

Q. — hiring of Stacy Burns? A. Yes, I do.

Q. Which law did he violate? A. The law that you arrest people with an outstanding warrant before you hire them.

Q. Wait a minute. We're talking about what law B. J. Moore violated, the sheriff. A. Well, he had an obligation to arrest

individuals that have an outstanding warrant for them. At the time he applied for that position, B. J. Moore should have been and probably was aware of that fact and he didn't arrest that individual. That's a violation. Then he hired him as a deputy.

Q. Anything else? A. That is all, in terms of the law.

Q. All right. Now, did Stacy Burns violate any Oklahoma standards as set by the Legislature in becoming a reserve [362] deputy? A. Not that I can tell.

Q. So the Oklahoma — so by Oklahoma State statutes, Bryan County Sheriff's Office and Stacy Burns complied with the peace officer qualifications and standards in his hiring and serving as a part-time deputy? A. That's correct.

Q. All right. As I understand, your criticism of Mr. Burns is that if he had committed a lot of driving violations as a teen-ager, and if he had gotten in a fight as a teen-ager and paid a fine, and if he had gotten drunk in a car and was asleep and they arrested him, that that makes it impossible for him to ever properly be considered as a candidate for a deputy sheriff?

MR. WALKER: Your Honor, we object. I believe the Court had instructed Counsel not to go into the facts surrounding the arrests or convictions of Mr. Burns.

THE COURT: Well, on cross examination, Counsel, that doesn't apply.

A. What you would examine is the pattern of behavior in the past. Now, most of that behavior was within the preceding two and a half years. And when you look at that pattern of behavior, I would say that it's negligent to hire someone under those circumstances, given the pattern for behavior which shows blatant disregard for the law.

[363] BY MR. JACK KENNEDY:

Q. When he was arrested for I believe APVC or whatever it is, asleep in a car and drunk, he was 18 years old, was he not? A. I'd have to check. I'm not certain.

Q. Well, could you do that, please? I think it shows 1988, but you can check it. A. He was finally arrested on the warrant in 1990. Let's see, public drunk, it would be in September of 1989.

Q. When he was arrested in Marshal County? A. In Cleveland County for public drunk.

Q. I'm asking you about Marshal County when he was in an automobile — A. Driving under the influence?

Q. Yes. A. He would have been 18 years old, that's correct.

Q. Okay. Are you saying that if a teen-ager who goes to college and gets drunk in a car, that he does not have the proper background to become a police officer? A. I'm saying you don't look at an individual case. You look at a pattern and you look at the totality of the circumstance, including any other offenses that he's been arrested or convicted of.

Q. And if as a teen-ager he was — had a heavy foot and got a lot of tickets at driving, that should be a reason that he [364] cannot become a police officer? A. A combination of numerous tickets and citations is an indication of what kind of behavior you should expect from him, and it's certainly an indication that you need to probe into that individual's behavior through background investigation.

Q. Now, these are your opinions and not the state law, am I correct? A. That's correct.

Q. All right. Now, you have been critical of the sheriff for not screening his deputies or just Stacy Burns? A. Specifically, Stacy Burns, and I have no indication whether the screening process for anyone else was different.

Q. So the evidence you want the jury is that the only evidence you have as to the sheriff's custom, or only evidence you have as to the manner of hiring applies to his lack of screening of Stacy Burns, is that correct?

MR. WALKER: Your Honor, we'd object. I believe the question calls for a misapplication of the law. I believe the law is that one decision by the policymaking official for a county —

THE COURT: Well, Counsel, I'm going to instruct the jury on the law. And as I told you before, the law will come from the Court. What the lawyers say the law is is not binding and not controlling. Don't pay any attention to it. [365] I'll — if that's an objection to the question, I'll overrule it. You may —

MR. JACK KENNEDY: If you can read the question back, or can you answer it?

THE COURT: Well, just re-ask the question, Mr. Kennedy.

MR. JACK KENNEDY: All right. I've forgot what it was, Judge.

BY MR. JACK KENNEDY:

Q. The only complain that you have as to the sheriff's department is the lack of screening of Stacy Burns' application

to become a police officer? A. I believe Under-Sheriff Wallace indicates that they did have a lack of particular standards to maintain maximum flexibility in hiring, et cetera.

Q. I didn't ask you that, sir. A. So I would conclude from that they don't have any standards for anyone else either.

Q. You're assuming from what? A. I would conclude from that they don't have any standards for hiring any other deputies either.

Q. Assuming from that are you — A. From the comments made by Under-Sheriff Wallace in reference to the need to have flexibility, and that's why there's a lack of standards.

[366] Q. I take it, then, that you have made absolutely no investigation of the hiring of deputies by Sheriff B. J. Moore during the past year or so you've been employed to testify in this case? A. I'm basing my opinion on the depositions.

Q. A deposition that was taken by Mr. Walker of B. J. Moore? A. Yes.

Q. All right. A. And of the other people, Under-Sheriff Wallace.

Q. Let me ask you this: I submit to you that every deputy, every deputy that was hired and employed by the county sheriff, B. J. Moore, at and before this incident, was a certified fully trained C.L.E.E.T. trained officer of the peace. I submit that's what the evidence will show. Assuming that to be true, are you still critical of the people that Sheriff Moore employed to be his deputies? A. I would disagree with your term, fully trained. I've already indicated that I don't believe the deputies were adequately trained.

Q. In other words, what you're saying is if they're fully trained under state law, that's not fully trained under Dr. Schweizer's law? A. State training, the minimum training requirements under state law is insufficient, and I've indicated there's a need [367] for departmental training. So I wouldn't consider that fully trained simply by having gone through the state training.

Q. Let's go back to my question. We're talking about hiring now. If the only people that the sheriff hired were people who had been, had complied in every facet with the Oklahoma law of training, would you say his manner of hiring those people was insufficient in any way? A. Yes.

Q. And what would that be. A. You have to make sure they're not drug addicts. You have to make sure they're not on, they're not alcoholics. You have to make sure they haven't been engaged in criminal offenses, they don't have any warrants out for them somewhere. You still have to ensure that they're not engaged in any particular behavior which would make them unsuitable for police work. Just because you're a policeman somewhere doesn't mean necessarily you're suitable to be in that position. And there are police officers in Oklahoma who leave one agency when they're unsuitable, find a job in another agency which fails to do an appropriate background.

Q. Okay. Now, if there is — strike there.

You have made no effort whatsoever to find out if that occurred in his hiring selection process, have you? A Well, there's no indication that any backgrounds are conducted.

[368] Q. Answer my question, please. You have made no investigation to determine whether in truth and fact, that has occurred in hiring — A. What has occurred now?

Q. In the hiring process. You don't know anything about how he hires people, do you? A. Not anything other than what's indicated in the depositions.

Q. In his deposition. Now, I believe you were critical of the training of Mr. Burns — let me ask you this: Do you believe in on-the-job training of young police officers? A. Yes, it's essential.

Q. Okay. And you — A. On-the-job training. There's a difference between on-the-job training and field training which occurs after a completion of the regular academy. So I don't believe police officers ought to be trained to do their job in a form of on-the-job training. I believe field training ought to come after attending academy and learning the laws and the processes and in an academy environment. And after that, you're trained in the field.

Q. Again, that's your opinion and not the law? A. It's my opinion, yes.

Q. That's right. A. Well, the law, yes, that you be trained within one year [369] at an academy.

Q. Let me — the law at what? A. The law is that you be trained at a police academy, be formally certified by the end of one year of the initial year of employment in the State of Oklahoma. So that you have a requirement that you not only have, not only meet those initial requirements, that you be, or that you have completed training at the end of one year which means there's some emphasis on the importance of academy training.

Q. Well, let me be sure I understand what you're saying. Are you saying that it is a violation of law for the sheriff to issue a commission card, allow Stacy Burns to go to the C.L.E.E.T.

Academy and to ride with another senior deputy? A. What I'm saying —

Q. Yes or no, please. A. That is not against the law, no.

Q. Okay. And I believe, in taking your testimony down, you said that Mr. Burns needs the experienced or needs a seasoned officer to be with at all times, correct? A. He does, after training.

Q. Oh, he doesn't need it before training? A. Before training, they shouldn't allow him to be on the street.

Q. You shouldn't allow him to go with a seasoned deputy? Not in a uniform performing police duties.

[370] Q. But the law permits it? A. Even though the law permits it, yes.

Q. All right. One other thing that — as I understand your testimony, that that stop that night out on the highway, you said it was improper after they saw it was a misdemeanor, to ask the people to get out of the car? A. Would you repeat that question?

Q. Did you testify this morning that after the officers stopped a car and determine it's only a misdemeanor in Texas, that they should not ask them to get out of the car? A. I indicated they had no reason to believe it was anything other than a misdemeanor at the time they were engaged in the pursuit. And then if they felt that there were — there was a potential danger and threat from that particular vehicle, then they should have refrained from having both people exit the vehicle. And then the manner in which they approached the vehicle, even if they decided to do so, the manner in which they approached it was improper.

Q. Well, let me ask it again. We have the officers approaching, from Oklahoma, approaching a car in Texas and they only have observed a misdemeanor. Are you saying that they should not take any further action but let that car go? A. They can't legally take any further action.

Q. I'm sorry? A. They can't legally take any further action.

* * *

**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS
— DIRECTED VERDICT**

[407] * * *

THE COURT: You may be seated.

What says the Defendants at this time?

MR. JACK KENNEDY: We have various motions to make at this time, Your Honor, if we could.

THE COURT: All right. You may go ahead and make your motions.

MR. DAVID KENNEDY: Your Honor, may it please the Court, the Defendants move for a directed verdict on all counts brought by Plaintiff against Defendants on the basis that there is insufficient evidence and no evidence to support the elements of the cause of the action.

The Defendants, if they could address these first with regard to the allegations of Constitutional violations [408] under Section 1983 as against the County. The Defendants see the claims of Plaintiffs as being one for negligent hiring, training and supervision first. And Defendants would argue that such as to come from a showing of gross negligence amounting to a conscious indifference in its failure to train, hire and supervise Stacy Burns. And the evidence as been presented by Plaintiffs fail in this regard.

And further, the evidence that has been presented by Plaintiffs is as to allegedly one misconduct on the part of the County and that being the hiring by — the hiring and training supervision by B. J. Moore, the sheriff, who the Plaintiff has alleged as the policymaker.

It would be the position of the Defendant, we would refer the Court to the Supreme Court cases of *Oklahoma City vs. Tuttle* (spelled phonetically) as well as the *Langerand* (spelled phonetically) decision, that held that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police in failing to train a particular officer in question in the absence of evidence of at least a pattern of similar incidence in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread through the police force.

The best or the closest that the Plaintiffs have [409] come to that so far is the opinion testimony of the expert that has been presented here today that is nothing more than conclusion. They presented no facts that there has been this pattern of misconduct which was a moving force for an alleged Constitutional violation of excessive force that night used against Ms. Brown.

An isolated incident, if we are to assume what Plaintiff says is truth and fact, looking at things most favorably for the Plaintiff, does not expose a county to Section 1983 liability, and that is the complaint and the only evidence that they have brought forth to this Court today. And, of course, Defendants dispute as to whether that — and deny that that incident showed one of excessive force, but in looking at the light most favorable to Plaintiff, if we are to assume that it did, that would not give grounds as to the County in this regard and that Defendant for the 1983 violation.

For custom to violates rights, one would have to show that there's a persistent wide-spread practice by the County officials to violate or by B. J. Moore to violate or negligently train, hire and which in turn was a moving force behind the excessive, alleged excessive force used on May 12th of 1991. And there is

a total absence of evidence and insufficient evidence in that regard.

Further, all the evidence that has been shown again [410] shows that the police officers were certified according to law and that that was a policy of the department. Every officer that was working that night and for the police department was a certified law officer in according with State law. And even their expert admitted that he has no evidence that they weren't certified according to State law. His opinion was merely that that's not sufficient, but that opinion should not expose the County to 1983, violation, for constitutional violation if, one, in fact, occurred, which Defendants deny that there is.

Defendants also move for a directed verdict on the grounds of tort claims for the alleged actions of the County as well as Officer Burns, based on his alleged conduct. To the extent that they claim that Sheriff Moore should have investigated Officer Burns further and hired and trained and supervised him better, such cannot form a basis of liability since an exception exists under the Oklahoma Tort Claims Act, Section 155 of the same, because it was a discretionary act on behalf of B. J. Moore who had the authority to hire and train and place if he sought to do so.

Subdivision 5 of Subsection — or at Section 155 of the Act clearly states and excludes liability based on a failure of Sheriff Moore in this case or failure to exercise — excuse me, if Sheriff Moore or any member of the Council for performance of or failure to exercise or perform [411] an act. The act here that they complain of in order to get liability as to the County would be that of hiring, training and supervising, but they failed to do that act. That, according to the Tort Claims Act, cannot expose that county to liability. That's an Act that is up to the sheriff, and as such, it is specifically provided under the Section 5 thereof, that it should not be a grounds for liability against the subdivision of the State of Oklahoma, this being the County of Bryan.

Also, an exclusion exists —

THE COURT: Mr. Kennedy, have you — I know we have a great many provisions of the Oklahoma Tort Claims Act, but have you furnished us that particular provision that you've just referred to, 155?

MR. JACK KENNEDY: I'm not certain, Your Honor Let me look at my notes. I can certainly give the Court the copy I have before me. I have the other one written down

THE COURT: Well, if you have a copy, just give it to Mr. Pascall there.

MR. DAVID KENNEDY: I'll do that, Your Honor.

THE COURT: Because I —

MR. DAVID KENNEDY: If I may continue on, Your Honor, and then I'll be able to pass this —

THE COURT: All right.

MR. DAVID KENNEDY: — there's also an exclusion [412] under the Tort Claims Act in which they are basing a commonlaw action of negligence or gross negligence for any acts or omissions done in conformance with then current recognized standards. That is Subdivision 28 of Section 155 which is also the exclusion section. And that is the basis for the questions to the expert just a few moments ago as to whether they did, in fact, comply with Oklahoma State law, C.L.E.E.T., which governs the standard by which officers are trained. And were they in compliance with C.L.E.E.T., when, in fact, they let Stacy Burns, even though the expert may have felt more needed to be done and more training needed to be had, but were they in

compliance with C.L.E.E.T., and that was the issue. And his answer was yes, they were. In fact, even though he says he wouldn't allow on-the-job training, for instance, by Stacy Burns taking an automobile until he completed his training, in fact, the State law has stated that you may do so, that he may, in fact, get with other officers and travel with other officers as he was doing that night.

THE COURT: Let me ask you this, Mr. Kennedy. Hasn't an issue been raised as to whether or not the Sheriff was actually in compliance with the requirements, the state law requirements I'm saying, on May the 12th, as opposed, perhaps to sometime after that?

MR. DAVID KENNEDY: Your Honor, I don't believe an [413] issue has been raised in that regard that has anything to do with the problem —

THE COURT: You understand what I had reference to, certain documents being filed after May the 12th?

MR. DAVID KENNEDY: Yes, Your Honor. I'm aware and I guess the testimony here that was elicited at the end with regard to whether — as to the timing as to whether they were actually filed with 10 days, and I'm not sure I understand exactly the significance of the documents, but the testimony that came from the expert himself was that the current standards were hiring and training and supervising. Not as to when the document should be filed, but the hiring, training and supervising he had to admit is that as set by C.L.E.E.T., and that is the issue involved in this case, not when they filed a document, but rather was there a proximate cause, a moving force behind what Stacy Burns allegedly that night that somehow was evolved from the hiring, the training and the supervising of Stacy Burns. And their evidence their expert had to admit was if you go just by state law,

then so far as hiring, training and supervising, they complied. In this opinion, they had more to do. But so far as state law is concerned, they did comply in that regard.

And so in that regard, we would state that the then current recognized standard is Title 70, Section 3311, to which they complied with. And as a result, if that is a [414] current standard, there's a second basis under the Tort Claims Act as an exclusion for any liability to the County based on the actions of Stacy Burns, if, in fact, the jury were to find that he acted in negligence or gross negligence.

Next, Your Honor, that is with regard to the alleged liability under Section 1983 as to the individual, Stacy Burns. Defendants move for a directed verdict on the fact that there's no evidence or sufficient evidence to go to the jury on those causes.

The allegations against Stacy Burns who was riding in a patrol car and was driven to the scene by a certified officer, the allegations against Stacy Burns is that he used excessive force that night in the way that he handled the Plaintiff. Liability under those grounds, the issue is whether the force was grossly disproportionate to the need under the circumstances and was it inspired by malice rather than mere careless or unwise excessive zeal. And consistently, their own expert testified that he believes if he had been better trained or supervised, if they had checked better into his judgment, that sort of thing, that that may have led to the problem that night.

Those are all things that might fall under him being careless if we were to assume that that was the truth, that perhaps he was careless or excess zeal, but they don't show that he ever acted with malice. There's absolutely no [415] evidence that his force was grossly disproportionate. And, in fact, their expert so testified that the lowest level of force which is to be used if you

can't talk a person out of a car is the arm bar, and that's exactly what was used.

Her physician who she talked to, has stated that she was pushed to the ground. She has stated she was pushed to the ground or spun to the ground, and that's the evidence that is before the Court. We think that is insufficient evidence, no evidence that, in fact, there was excessive force, and their own expert has said that's the lowest level of force that can be used.

A law enforcement officer is justified in using force when and to the degree he reasonably believes the force is necessary to protect him or effect an arrest, and that is the standard we believe that liability could be imposed upon Mr. Burns, if at all. And the only evidence before this Court is the fact that he did reasonably believe that that force was necessary to protect himself and the others. There's no evidence that he with malice, exercising undue force, which would give grounds to 1983 liability.

Further, what was reasonable for Mr. Burns as he perceived the facts to be and how he perceived the facts to exist that night was there was a turn and a run from a roadblock. That's not in dispute. There was a chase that night, at least in the eyes of the officers who were chasing [416] Mr. Brown. Even if we were to assume Mr. Brown's statement that he wasn't running, the officers believed that they were in a chase and that's how it was perceived by Mr. Burns.

It was late night on a dark road off of Denison Dam.

The other officer, and according to what the evidence is, looking at it for Mr. Burns, the other officer, certified officer, has stepped out of the car, has drawn his gun and ordered the occupants to raise their arms. Mr. Burns has to take this situation as given to him and he has to react in that situation. He has

ordered the people out of the car. There's no dispute in that regard. So at that point, if, in fact, Mr. Burns, having gone through what he has gone through and seeing his fellow officer act in that regard who is certified and the people don't get out of the car, then it is what he perceives the facts to be justifiable force, that being what their expert has said, to be the lowest amount of force used to get the person out, handcuff her and immediately go to assist his fellow officer, which is the testimony of the Plaintiff. He didn't stand there, we don't have batons, being beaten, we don't have guns, being beaten. We don't have any of this. We have him immediately doing that and moving on to his fellow officer.

We would argue that hindsight is 20/20, but that's not the test. Instead, it is whether there's evidence [417] sufficient to go to the jury, as to whether that man perceived, Mr. Burns, that night, that he was acting with malice and disproportionate force under those situations in extracting the Plaintiff from the vehicle and handcuffing the Plaintiff. And we would suggest there is no evidence and insufficient evidence on the same.

And with regard to the common-law causes of action for negligence and gross negligence for any intentional conduct, if the same can be read in the pleadings, we would continue to insist upon the same basis as has been already stated to the Court, that there is no evidence and insufficient evidence on those grounds to go to the jury on the various causes of action which have been brought by the Plaintiff, and we would ask the Court to render a directed verdict on Defendants' behalf for those reasons, for those grounds.

THE COURT: All right. Thank you, Mr. Kennedy.

MR. DAVID KENNEDY: Thank you, Your Honor.

THE COURT: Who will respond for the Plaintiff?

MR. DAVID KENNEDY: Your Honor, if I may approach

THE COURT: Just hand it to Mr. Pascall right behind you.

MR. WALKER: Your Honor, in regards to — I believe Mr. Kennedy raised four points. The first being in regards [418] to the 1983 action, no showing of gross negligence, in regard to hiring, training and supervision. I believe the testimony is clear from a certainly well qualified expert that there was certainly negligence and gross negligence in the hiring or selection of Stacy Burns and in the training and supervision of Stacy Burns.

In that regard, you were cited the cases of *Tuttle* and *Langerand*. Both of those cases were decided prior to the case of *Pinbyer vs. The City of Cincinnati* (spelled phonetically,) a U.S. Supreme Court case. And in that case, contrary to the contention of the Defendants that a single incident is not sufficient, the Court held that it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under 1983 for a single decision by its properly constituted legislative body, whether or not that body had taken similar action in the past or intended to do so in the future, because even a single decision by such a body unquestionably constitutes an act of official government policy.

The Court goes on to say that a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular [419] course of action is properly made by the government's authorized decisionmakers,

it surely represents an act of official government policy as the term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. And that's what we have in this case.

A single decision by the stipulated policymaker for the Bryan County Sheriff's Department, for Bryan County in that regard, B. J. Moore's single decision, hiring Stacy Burns, it's been testified was the cause and proximate cause and was negligence and gross negligence resulting in the damages that Jill Brown has sustained.

In this case they talked about an instance where a decision or whether on not to enter a house to arrest a person within the house on a warrant was —

THE COURT: I don't think I need anything more on that, Mr. Walker. I'm interested in the Oklahoma Tort Claims Act.

MR. WALKER: Your Honor, I'm not familiar, that Section 155 and Section 28 has been called to the Court's attention previously or that that claim has been made. If it has been, that has been addressed in our brief and we would refer the Court to that.

[420] THE COURT: It's news to me, as I recall. I don't recall it ever having been raised in this case previously.

MR. WALKER: Your Honor, we would also perhaps question what protection the Tort Claims Act gives these officers in Bryan County when they routinely apparently set up roadblocks within a mile or two of the Texas line, apparently do not train their officers in regards to the pursuits into Texas. They

come into Texas and cause these injuries. I don't know that the Oklahoma Tort Claims Act has jurisdiction to extend and protect those officers for actually coming into Texas. And we would point that out to the Court in that —

THE COURT: Well, this case presents an interesting case as to what law is applicable. We started out in Oklahoma where I certainly think the Oklahoma law is applicable to the conduct of the police officers subject to the constitution of the United States and relevant laws. But then we get over into Texas where certain other conduct occurred and — do you have any thoughts on whether there's a — where the law changed, if it did change, that's applicable to this case?

MR. WALKER: I agree with the Court; it's interesting from a legal standpoint. But the actions that occurred in Texas that directly resulted in Jill Brown's injuries, there by the roadside obviously occurred in Texas. [421] And the testimony is that that was as a result of a county who selects someone such as Stacy Burns, with his history and background, and puts him in that position, and it was the result of the lack of training and supervision of that same officer, and also of Officer Morrison.

It may well be a unique situation, Your Honor. I certainly can't believe the law could be — all these things can occur and that a county anywhere in the United States can hire someone with a background and history such as Stacy Burns, not give him any training or supervision, and put him out on the road and these kind of injuries can occur without any redress for the person who is wrongfully injured.

THE COURT: Anything further?

MR. WALKER: Did you want me to respond in regards to the third and fourth portions?

THE COURT: Well, the court reporter is going to have to change paper. I think I will take a 15-minute recess and then hear the rest of that and during the recess, I'll be looking at this Oklahoma statute.

The Court will be in recess for 15 minutes.

(Recess from 2:25 p.m. to 3:04 p.m.)

THE COURT: Be seated.

Mr. Walker, you may conclude your response.

MR. WALKER: Your Honor, in regards to whether or not the Oklahoma Torts Claim Act provides any protection for [422] Bryan County in this case, I believe the evidence that's been presented so far, it's clear that roadblocks are set up habitually within a short distance of the Texas state line, that they provide no training to their officers in regards to pursuit, how to work with reserves, when they should pursue, how they should pursue, how they should stop. Whether they knew — they didn't know the laws applicable, once they entered into the State of Texas.

And once they entered into the State of Texas, they were outside their jurisdiction. They would have been acting as citizens although clothed in the — under the color of law of Bryan County sheriff's officers.

And in looking at Section 155, it says that the state or political subdivision shall not be liable if a loss or claim results from, and then to Section 28, acts, omissions done in conformance within current recognized standards.

That doesn't say that C.L.E.E.T. is the recognized standards. Dr. Schweizer testified, having been in Oklahoma for

the last four years and having been extensively trained in law enforcement, that the C.L.E.E.T. minimum standards are not sufficient and that any reasonable sheriff would have provided additional training, any reasonable sheriff would not have selected Stacy Burns, although Stacy Burns may have met the minimum requirements of State of Oklahoma law.

[423] Further, the state's minimum guidelines cannot be the recognized standard if they violate constitutional law. They can't result in unconstitutional deprivation of a citizen's rights or the public's rights.

In this situation, to apply Article 155, Section 28 as excluding the County from any tort liability claims would result in allowing states and cities across the country to pass laws that are unconstitutional and then exempt them from liability, therefore. And that's not permissible under federal law.

THE COURT: Anything further?

MR. WALKER: Not in regards to the Tort Claims Act, Your Honor.

Does the Court wish me to respond to Points 3 and 4 regarding 1983 as it applies to individuals and the common law of gross negligence and negligence claims?

THE COURT: I don't think so.

MR. WALKER: Thank you, Your Honor.

THE COURT: The Court is going to deny the Defendant's Motions for Judgement as a matter of law on the 1983 claims against both Defendants.

The Court is going to take under advisement for the time being the limitations set forth by Defendants and called to the attention of the Court in the Oklahoma Tort Claims Act. I'm going to — first time it's come up. I need to do [424] a little more research into it and I'm going to take that under advisement for the time being.

* * *

**EXCERPT OF TRANSCRIPT OF PROCEEDINGS —
BARNES TESTIMONY**

[Commencing at Page 495]

turned away from the microphone.

BY MR. JACK KENNEDY:

Q: In order for you to be an instructor at C.L.E.E.T., must you have familiarized yourself with all of those various subjects that you told us about or do you take particular ones? A. Instructors are assigned particular courses to teach. In the almost 10 years I've been there, I've taught most of the courses. I don't generally teach self-defense, but I am the State's expert in patrol tactics and vehicle stops. We just recently made a national videotape on training for vehicle stops.

Q. Okay. What is the law under Title 70, Section 3311, with respect to the obligation of a deputy — obligation of a sheriff in Oklahoma toward employing someone to become a deputy? A. Under 3311, there is a specific set of standards that an officer must have, a person must have before he can be hired by an agency. He must be 21 years of age. He must have no conviction for a felony or an act of moral turpitude. He has to be commissioned by the department. He has to take a MMPI, which is a Minnesota Multiphasic Inventory, a psychological evaluation exam. It has to be graded. They are generally, once it's graded, if there is some problem with the officer, they will get back with the department. The officer must [496] complete the training, the basic academy training, certification training within one year of his employment date. So in other words, he has a year before he has to go to training under the state statute.

Q. After January the 1st, 1991, was there any change as to

additional training under C.L.E.E.T.? A. Yes, sir. As the Legislature enacted a new law effective January 1, 1991, stating that all officers must go to eight additional hours of training within the calendar year for the purpose of updating their abilities and skills.

Q. If a person has completed the necessary 320 hours of C.L.E.E.T. and has been certified to be a deputy, has he complied in all respects with the obligation of the Oklahoma statutes? A. Yes, sir.

Q. To act as a deputy? A. Yes, sir, I believe he has.

Q. Are there any written requirements that candidates be screened or screening process be set up before someone is employed? A. The statute indicates that they must do a background investigation and submit fingerprints to the Oklahoma State Bureau of Investigation and the FBI.

Q. Is that all? A. That's all the statute says, yes, sir.

[497] Q. And they have to be 21 years of age and have not been convicted of a felony? A. Yes, sir.

Q. Are there any standards in the year 1991 and previous as to state law having on-the-job training? A. There's nothing specific in the 3311 that denotes that OJ training must be done, on-the-job training, but many departments, even though the law states that they will not put people into the field without training, they provide OJT. They have a master and senior officer training programs. They have field officer training programs. So many of the agencies provide their own training as OJT and do not let them out on the street by themselves until they've had some training. And some agencies do not do so until after they come back from the academy.

Q. What has been — are you experienced as to whether or not there is people who go to the reserve academy, whether or not they're utilized by way of on-the-job training during that period of time? A. There's not any way that I would specifically know except that many departments, based upon my experience in dealing with them, they do provide training to their people and they get them to the academy, reserve academy as it applies, because an agency has to be willing to sponsor reserve academy before one that go on in the area. So

* * *

[516] Q. All right. What is your position with C.L.E.E.T.? A. I'm an instructor/coordinator.

Q. All right.

MR. WALKER: May I approach the witness, Your Honor.

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, I want to hand you the deposition of Velma A. Gehrke, I guess, a records custodian for the C.L.E.E.T. training program in Oklahoma. Do you know Ms. Gehrke? A. Yes.

Q. Am I anywhere close to pronouncing — A. Gehrke, I think.

Q. I want to direct your attention to Page 3 of that deposition, Line 16, where the question was asked: When did Stacy Burns apply for training with C.L.E.E.T.? And the response to that was what? A. Looks like May 6th.

Q. All right, of 1991? A. Yes.

Q. And the following question was: When did Stacy Burns begin his training with C.L.E.E.T.? And what was that response? A. The same response it looks like.

Q. So at the time of this incident, there was at the most [517] six days that had expired that Stacy Burns had applied and began training with C.L.E.E.T., isn't it? Isn't that true? A. Yes.

Q. The six or seven weeks that you had projected is not accurate, is it? A. The —

Q. Is that accurate? A. Not according to that, no.

Q. You would agree that Ms. Gehrke is the custodian of the records for C.L.E.E.T.? A. Yes.

Q. And if Ms. Gehrke gave a sworn deposition and stated that fact, she would have access to the records and would have knowledge of whether or not that was the case? A. I believe so.

Q. Now, Mr. Barnes, if we're going to be honest with this jury, wouldn't you agree that Stacy Burns, on the night of May the 12th, 1991, did not have the training and experience to be in the position out there on Highway 1310, approaching a stopped vehicle, did he? A. No, sir, I don't agree.

Q. You're telling this jury that you believe Stacy Burns has sufficient experience to go out there and participate in what you've described as a high-risk stop on a dark lonely road?

* * *

[526] * * *

Q. I believe you had indicated to me that you don't know what B. J. Moore's hiring policies were at the time or if he had any? A. No, sir I do not.

Q. Do you believe B. J. Moore complied with the notice requirements of putting, when he hired people for his department? A. I really don't know specifically.

Q. All right. Did you know at the time of your deposition? A. I don't believe so. I may have, but I don't recall.

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, referring you to Page 25, Line 11 of your deposition I'd asked you some questions in your deposition about, just as I'd asked you here, about your not being familiar with any hiring practices by B. J. Moore, is that correct? [527] A. Yes.

Q. And then I asked you: If he has any rules, you're not aware of them? And what was your response? A. I'm sorry, where are you at? I don't know what he has. I know he complied with 70, 3311 by sending in a notice that he had put people in his department.

Q. All right. That's — you're talking about the employment status report — A. Yes.

Q. — that's required to be filed and that's to be filed within 10 days of allowing someone to act as a sheriff's reserve or deputy? A. Yes.

Q. Do you still have that same opinion or do you know? A. That he filed the report, yes. He did file the report.

Q. Did he comply with the notice requirements as to when he was to file that report? A. You mean the time?

Q. Yes. A. No. Probably not.

Q. What is the purpose of these notice requirements? A. These requirements are for compliance that people hired on with the department are reported to C.L.E.E.T. so that they can open a record on the employer — employee, and that within 12 months he is to get his training or that he removed [528] from duty.

Q. All right. Isn't it a custom in Oklahoma for many times officers to lose their employment near the end of that 12 months and then begin their employment again shortly thereafter in order to avoid the training requirements of C.L.E.E.T.? A. It used to be, but that's been changed. When you first hire on now, the time clock starts. If you change jobs 22 times, it doesn't matter. Time starts on the first one.

Q. Part of this notice requirement allows C.L.E.E.T. to open up a file I believe you said on an individual? A. Yes.

Q. And included in that file would be criminal history checks? A. No, sir, not in C.L.E.E.T.'s file.

Q. C.L.E.E.T. has nothing to do or never receives the criminal history check of their applicants? A. They have an

application and it has the notation on there that they have checked, I believe, NCIC, or sent the prints out, but they don't get the actual record I don't believe.

Q. So C.L.E.E.T. never sees those records, is that what you're saying? A. Generally not, yes.

Q. Okay. You would agree that Sheriff B. J. Moore is [529] responsible for the acts of his deputies and his reserves in this case, wouldn't you? A. Yes.

Q. What are the requirements that C.L.E.E.T. requires, the minimum requirements that C.L.E.E.T. requires in regards to a criminal history of an applicant? A. I believe the application states that the agency head signs off on that he's sending, sent for the FBI and OSBI print check. There may be something else but I don't recall.

Q. Well, is it a requirement that you cannot become a deputy or a reserve in Oklahoma if you have a felony? A. Yes.

Q. Or a crime of moral turpitude? A. Yes.

Q. And you would agree with me that you believe that a crime of moral turpitude could include a driving under the influence, don't you? A. I think that's subjective.

Q. It could include that, couldn't it? A. Yes, sir, it could.

Q. In fact, that standing alone could be sufficient to prevent a person from being hired as a deputy or reserve, couldn't it? A. It should, yes, sir.

Q. And wouldn't you agree with me that a conviction for [530] driving while license suspended or two or three

convictions for driving while license suspended could also be considered a concern in deciding whether or not to hire an applicant as a deputy or as a reserve? A. It could be a concern, yes, sir.

Q. Particularly, wouldn't you agree that the combination of driving under the influence with several DWLS's, a combination would cause you probably a great deal of concern about an applicant, wouldn't it? A. Yes, sir. I would also look at the age.

Q. Would that, then, not trigger in you and any other reasonable person that maybe the background should be checked a little closer? A. On an unknown person, yes.

Q. All right. And if you checked the background a little closer, it's real easy in Oklahoma or Texas or any other state to get someone rap sheet, isn't it? A. Yes, sir, it is.

Q. And if you check that rap sheet and you found convictions for public drunk, several for driving while license suspended, for assault and battery, for DUI, for presentation of false identification, for numerous traffic citations, including reckless driving and careless and wanton driving, wouldn't that cause you some concern in whether or not you should allow that applicant to become a reserve or a [531] deputy? A. Yes, sir. However, some of those that you mentioned were misdemeanors and might not be on some of the rap sheets, because they generally list only felonies.

Q. You have to look a little bit harder, don't you? A. Yes, sir.

Q. When you look on the rap sheet, often times it does list those things, doesn't it? A. Not really sure. They mentioned changes a couple of years ago in the FBI reports where they only

wanted to list felonies, and they were sending FBI reports back, but the old FBI reports may, indeed, have misdemeanors on them.

MR. WALKER: Your Honor, may I approach the witness

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, I want to leave with you for the moment Plaintiff's Exhibit Number 29. What is Plaintiff's Exhibit Number 29? A. This is the OSBI rap sheet.

Q. All right. And that document easily attainable by Sheriff B. J. Moore? A. Yes.

Q. And does that — well —

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

[532] BY MR. WALKER:

Q. Mr. Barnes, whose rap sheet is that? A. Stacy Steve Burns.

Q. You believe that to be the same Mr. Burns who is the Defendant in this case? A. I believe so.

Q. And what's the first arrest indicated on that rap sheet? A. 2/25/89, DUI, liquor or drugs, APCV.

Q. All right. And what is the next indicated arrest? A. 9/7 of '89, assault and battery.

Q. And the next? A. 1/4/90, traffic offense — I beg your pardon, excuse me. 9/7/89, resisting.

Q. All right. Hang on just a second. I want to make sure we get this accurate.

Let's back up to the second one. You mentioned the second one was an assault and battery? A. Yes.

Q. And what is the next one? A. 9/7/89, resisting officer.

Q. All right. And the next one? A. 9/7/89, public drunk.

Q. All right. I see you skipped an assault and battery charge here. A. That's the same charge.

[533] Q. It could be that that's two separate assault and battery charges that occurred on the same day, isn't it? It could have been two different complainants? A. I suppose it's possible. It's all under one listing from Cleveland County SO, but often you'll see it doubled up as in down here below, you see it doubled it up.

Q. And it's just as likely, as far as the knowledge that you have sitting here today, that there's two different complainants, isn't it? A. It's possible. Generally, they have two counts written out here or three counts if they're charging multiples.

Q. All right. What is the next offense? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, assault and battery.

Q. The next? A. 1/4 for '90, assault and battery.

Q. Next? A. 1/4/90, public drunk.

Q. The next? A. 1/4/90, traffic offense.

[534] Q. Next? A. 1/4 /90, traffic offense.

Q. And the next? A. 1/4/90, tax revenue.

Q. And the next one? A. Traffic offense, same date.

Q. And three more of those in a row? A. Three more of those in a row.

Q. And the next? A. 1/4/90, make sale, possession of false I.D.

Q. All right. And the next? A. Traffic offense.

Q. Then the rap sheet begins to list convictions, doesn't it? A. Yes, it does.

Q. And what's the first conviction listed? A. 1/4 of '90, pled guilty as charged to assault and battery, jail, 40 days.

Q. All right. And the next? A. 1/4 of '90, pled guilty as charged, make sale, possession of false I.D., \$25 fine, suspended.

Q. The next? A. Pled guilty as charged, public drunk, 30 days.

Q. And the next? A. Pled guilty, was charged with operating a vehicle [535] without proper I.D. evidently. \$100, suspended.

Q. And the next? A. Pled guilty as charged, driving with a license canceled. Suspended, 40 days.

Q. The next? A. Pled guilty as charged, speeding posted zone. \$10, suspended.

Q. All right. And the next indication is what? A. 5/8 of '91, police applicant.

Q. All right. That would indicate an inquiry from someone requesting his rap sheet? A. Yes. It says Bryan County, Durant, Oklahoma.

Q. And that was on 5/8/91? A. Right.

Q. So it would appear that that request was made on 5/8/91 for that rap sheet, is that correct? A. I don't — can't tell that from this.

Q. Okay. A. It just shows it's a police applicant. They could have sent something in rather than request the rap sheet.

Q. All right. They can have those telefaxed to them, can't they? A. Yes, they can.

Q. Mr. Barnes, in regards to the DUI, I didn't hear you mention the disposition of that case. Do you see any [536] notation on that rap sheet of how that discussed was disposed of? A. No.

Q. Mr. Barnes, if you were a sheriff who was interested in hiring only proper people, with that type of history looking at you

in May of '91, wouldn't you have some concerns? A. Yes.

Q. And wouldn't you, particularly you see no disposition on some of the charges, for instance, the DUI. Wouldn't it be appropriate or reasonable for a sheriff, prior to putting someone on the street as a deputy or reserve, to check that out? A. Yes.

Q. And to check that out, all you'd have to do is call the county where that charge occurred, wouldn't it? A. Yes.

Q. And talk to the Clerk or the DA or somebody and asked them what happened? A. Yes.

Q. And if you did that and you found out that, in fact, the DUI was disposed of by a plea of guilty and the individual placed on probation, resulting in a conviction, would that again cause you concern about that applicant? A. Yes.

Q. And if you also found out in that same call that his [537] conditions of probation required him not to violate the law and you found that, in fact, a motion to revoke his probation had been filed for violating the law, wouldn't that cause you some concern? A. Yes.

Q. And if you found out that that motion to revoke had been filed and, in fact, a warrant had been issued and was outstanding at the time, that would cause you concern, wouldn't it? A. Yes.

Q. You wouldn't put that man on your law enforcement agency, put him on the street, would you? A. To be honest, I'm not really sure, but I'd say it would be doubtful, yes.

Q. Were you aware that on May the 12th, 1991, were you aware prior to today that Stacy Burns had a warrant outstanding for his arrest? A. No.

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — BURNS TESTIMONY

[Commencing at page 569]

Q. Would you please state your name to the jury? A. Stacy Steve Burns.

Q. Mr. Burns, what is your age? A. Twenty-three.

Q. And where were you born? A. In Durant, Oklahoma — in Denison, Texas. I'm sorry.

Q. And what is your birth date? A. April 11th, 1970.

Q. And what is your present business or occupation? A. I work at an insurance office.

Q. And what is the location of that office? A. That's in Durant, Oklahoma.

Q. And tell the jury, if you will, your educational background. A. I went to Durant High School. Graduated from Durant High School in May of 1988. I believe after that I attended Southeastern State University for possibly I believe that summer session there, if I'm not mistaken.

Q. I might ask you to speak out just a little bit, Mr. Burns. A. Then I went to the University of Oklahoma and attended several semesters there. And I've also attended some semesters at Oklahoma Christian College in Edmond, Oklahoma.

Q. And how long were you at Oklahoma Christian College? A. Three trimesters, I believe.

[570] Q. Okay. Was that before or after or during your going to school at Oklahoma University? A. That was, I believe, before. I'm not sure because I switched in between there, but I believe it was right before.

Q. Are you presently attending any school? A. Yes, sir, I am.

Q. And what school are you presently attending? A. Southeastern Oklahoma State University.

Q. And where is that located? A. In Durant, Oklahoma.

Q. Are you working and going to school? A. Yes, sir.

Q. What courses are you taking — what is your major that you're working toward? A. Criminal justice.

Q. What relation are you, if any, to Sheriff B. J. Moore? A. He is my uncle.

Q. And what relation are you to Joe Calclazier? A. That's my grandfather.

Q. To your knowledge, how long have those two individuals been in law enforcement? A. I believe Joe Calclazier has been in for 16 years, if I'm not mistaken, and B. J., I have no idea. I know he was a deputy for quite awhile before he was the sheriff of Bryan County.

[571] Q. Is Mr. Moore commonly called B. J.? A. Yes, sir.

Q. Now, prior to your going off to college — let me ask you this: After you got out of high school, what work or educational

pursuit did you first do? A. I worked there in the Durant area at two furniture stores during the time that I stayed in Durant after graduation.

Q. What furniture stores did you work with, if you recall? A. For Collier Brothers Furniture and for Home Furniture Company.

Q. And what did you do for them? A. General delivery and sales.

Q. Kind of a "go-fer"? A. Basically, yes.

Q. All right. And you got out of high school at what age? A. At 18.

Q. And then when did you go to your first college course, at what age? A. I believe it was that semester, so I believe it would have been 18. I think I might have taken one summer course there at Southeastern.

Q. Okay. After you got out of high school, you took the summer course and then where did you next go? A. For college?

[572] Q. Yes. A. I went to Norman, Oklahoma to the University of Oklahoma.

Q. Now, as a kid growing up in Durant, from the time that you were born until you were 18, tell the jury what problems you had with the law, if any, during that period of time? A. During the time up to I was age 16, I had no problems with the law at all. Then whenever I turned 16, I've had — I've had quite a few traffic tickets, quite a few speeding tickets.

Q. In other words, you drove too fast? A. Yes, sir.

Q. Failed to stop at stop signs, that sort of thing? A. Yes, sir, things of that nature.

Q. Okay. Now, when you went to Norman, was that in 1988, the first time? A. I believe it would have been the latter part of '88 and the first part of '89, I think.

Q. All right. Now, they have made inquiry about you having a DUI in Marshall County, I believe. Is that correct? A. It was not a DUI. It was an APC.

Q. Would you please slowly explain to the jury what an APCV is? A. Okay. Well, the difference between a DUI and an APC, a DUI, the officer sees you driving and the officer, you know, [573] picks you up while you are driving and pulls you over. And an APC, you're necessarily sitting in a car somewhere and had been drinking and they pick you up for that purpose.

Q. Okay. At the time you were arrested in Marshall County, were you driving your automobile or were you on the side of the road asleep? A. I was sitting on the side of the road asleep.

Q. And why did you pull off to the side of the road? A. I realized I had had too much to drink and I couldn't drive all the way back, so I just pulled over.

Q. All right. And did the law enforcement authorities of Marshall County take you to jail? A. Yes, sir, they did.

Q. Now, you have been — let's go on further. After that incident, where did you — did you continue at school at Oklahoma University? A. Yes, I did.

Q. And during the time that you were at the University of Oklahoma or elsewhere, did you violate traffic laws? A. I'm sure I had some traffic offenses in between that.

Q. Okay. During your years as a teen-ager, did you on numerous occasions violate traffic laws? A. Yes, sir, I did.

Q. Did you drive while your license was under suspension? A. Yes, sir.

[574] Q. What other traffic laws do you recall that you violated while — before January of '90? A. Well, as I said, I had several driving, or I had driving under suspension and several traffic tickets. I believe on there also might have been for an expired tag and things of that nature. That's been five years ago. I don't recall everything on there.

Q. Now, the Counsel has asked the past witness about things that occurred on January the 4th, 1991. Do you recall that? A. Yes, sir.

Q. The events that he asked about on January of 1991, did they occur in January of 1991 or did they occur at a prior time? A. They occurred late in 1989.

Q. Where? In what county? A. In Clayton County in Norman, Oklahoma.

Q. Is that the university of Oklahoma? A. Yes, sir.

Q. In September of 1990, excuse me, in September of 1989, did you get in a fight on the campus? A. Yes, sir, I did.

Q. And what were the facts concerning that fight that you got into? A. Well, I was driving through a parking lot there

right across from the campus, across from the dorms, and a group of [575] fraternity guys, pledge class, were walking across the street. And I was driving down the street and several of them, or one of them, possibly, hit my car.

Q. All right. Then what happened as you recall? A. Then I believe I stopped the car and I did get out of the car and asked them why they were hitting the car and why they were acting the way they were. Several of them jumped up and started pushing on me so I in turn did the same thing.

Q. You had a fight, is that correct? A. Yes, sir.

Q. And were you charged with assault and battery? A. Yes, sir.

Q. Now, was that assault and battery charge against you for that event settled then or was it settled in January of '90? A. It was settled in January of '90.

Q. Counsel read off a long list of things that occurred in January of '90. Tell the jury whether or not all of those occurred at the same time or at subsequent times? A. They all occurred at the same time. They were all taken care of at one period in time.

Q. I'll ask you whether or not Mr. Calclazier was around at the time this — the judge did whatever he did? A. At the time we went to Court, yes, sir.

Q. Okay. And did you plead guilty to the assault and battery and the traffic violations? [576] A. Yes, sir, I did.

Q. And what was your age at that time? A. I believe I was still 18 or I may — no, I believe I had turned 19.

Q. All right. Now, during your lifetime up until May of '91 when this event occurred, how many fights have you gotten to that you can recall? A. Probably two in my entire life.

Q. Had you ever, prior to May of '91, been charged with fighting or that sort of thing that you recall, in Durant? A. May of '91?

Q. Yeah. The time this event happened? A. Oh, no, sir.

Q. Have you ever been charged and convicted of a felony? A. No, sir, I have not.

Q. When you were a teen-ager, did you drive badly? A. Drove very fast.

Q. Do you believe that that affects your ability to serve and try to become a reserve deputy? A. No, sir, I do not.

Q. Now, when Counsel asked you about you having been arrested in your deposition, were you totally truthful with? A. No, sir, I wasn't.

Q. Why not? [577] A. The assault and battery convictions, nobody — nobody knew about those and that was really something that I was trying to live down, that I didn't want anybody to know, and I didn't — I wasn't truthful about the assault and batteries.

Q. When did you decide to try and become a reserve deputy? A. I believe in possibly the summer of 1990. I had thought about it and talked to my grandparents about it.

Q. Okay. And what did you do, then, to try to make, take whatever steps necessary to become a reserve

deputy? A. Well, I had talked to my grandfather about it and talked to B. J. both, and asked them about reserve academies and what they were like and how long they would last and what they consisted of, and also where they were at.

Q. Okay. A. And —

Q. And is your grandfather a reserve deputy? A. He is a special deputy.

Q. Special deputy. And to your knowledge, has he been a deputy for 16 years? A. Yes, sir, he has.

Q. Do you recall when you started going to C.L.E.E.T.? A. I could not give you the exact date.

Q. All right. Tell the jury what C.L.E.E.T. is, as you utilized it?

* * *

[600] A. Yes, sir, I do.

Q. During the period of the time that you have gone to college after high school, have you or not always tried to maintain a job? A. Yes, sir, I have.

Q. Where are the different places you have worked at Joe Coker Pontiac/GMC, selling cars. A. I've worked at Charleston's Restaurant as a waiter and a bartender. I've worked at Newman Chevrolet, again selling cars. I've worked at the insurance office during various insurance work and things of that nature.

Q. All right.

MR. JACK KENNEDY: I pass the witness.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. WALKER:

Q. Mr. Burns, how long had you been working for Bryan County at the time of this incident? A. I do not recall the exact length of time.

Q. How long had you been attending the C.L.E.E.T. Academy at the time you began or as of May the 12th, 1991? A. As of May the 12th, I'm really not for sure how long we had been there. It's been quite awhile ago.

Q. Is it true that at the time of the incident of May the 12th, 1991, you had received no training from the Bryan [601] County Sheriff's Department? A. I had watched the LETN, but no formal training, no.

Q. Well, you recall I took your deposition, don't you? A. Yes, sir, I do.

Q. And you've told this jury there were some things during that deposition that you didn't want us to know? A. Correct.

Q. Did you not want us to know that you had watched these LETN programs? A. No, sir. I was just speaking of formal training. I thought that's what you were talking about when you asked me that.

Q. Well, the question specifically that I asked you — you've read your deposition in preparation for your testimony today, haven't you? A. Yes, sir.

Q. The specific question I asked you was whether or not you had received any training through Bryan County prior to this incident, wasn't it? A. Yes, sir.

Q. And your answer was no, wasn't it? A. Correct.

Q. But you want to tell this jury now that you had some additional training that you didn't want me to know about? A. I just watched the LETN. That's basically it.

* * *

[602] Q. You had no experience as a patrol officer prior to beginning your work as a reserve with Bryan County, had you? A. No, sir.

Q. And during the entire length of your deposition, you never told me that you had worked there as a dispatcher or had any other involvement with Bryan County, did you? A. No, sir.

Q. You had received no training regards the roadblock procedure from Bryan County, had you? A. No, sir.

Q. You received no training in regards to the pursuit across state lines? A. No, sir.

Q. Isn't it obvious to you that if law enforcement officials were going to set up roadblocks near a state line in what you've described as a high crime area, that those officers manning that roadblock should be trained or receive training regarding pursuits?

MR JACK KENNEDY: I'm going to object. It's speculative, unless he wants to utilize this man as an expert. I object to it otherwise as speculative, asking for him to —

THE COURT: Well, I believe his relation to the incident is such to where he can express an opinion on that. Overruled.

[603] A. I don't know whether they should or not.

BY MR. WALKER:

Q. All right. At the time of the incident, you had received no training in regards to your authority to arrest in Texas, had you? A. No, sir.

Q. The night that this incident occurred, there was no one that was placed in charge of you, were there? A. The person that I was riding with was more or less in charge of me.

Q. Now, that's not what you indicated to me in your deposition, did you? A. I don't recall.

Q. How old were you back in May of 1991? A. Twenty-one, I believe.

Q. And as I understand it, the only restrictions placed upon your were that you were not to carry a gun or to drive a police car? A. Yes, sir.

Q. Otherwise, Brown County had authorized you to perform all other acts of a police officer? A. Any that that police officer told me to do, yes.

Q. No one told you to go get into the patrol car and join in this pursuit, did they? A. No, sir.

[604] Q. No one told you to exit the patrol car after the stop was made, did they? A. Not to my recollection, no.

Q. No one told you to go to Jill Brown's side of the pickup, did they? A. Not to my recollection.

Q. No one told you to extract Jill Brown from the vehicle, did they? A. Not to my recollection, no.

Q. No one told you to take Jill Brown to the ground and handcuff her, did they? A. No.

Q. Did you believe you were authorized to take those actions? A. Yes, sir, I did.

Q. And you'd been authorized to perform those acts by B. J. Moore, hadn't you? A. Yes, sir.

Q. What were you wearing there on May the 12th of 1991? A. On that evening, I had a sheriff's shirt on, a badge, blue jeans, a pair of boots, I believe, and a gun belt.

Q. You appeared to be a Bryan County Sheriff's Deputy? A. Yes, sir, I did.

Q. Where had you gotten the badge? A. I believe I got that from the sheriff's department. I'm

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[613] * * *

BY MR. WALKER:

Q. You believe you're an honest person? A. For the most part, yes, sir.

Q. Well, you recall in your deposition I asked you to tell me about all the times you'd been arrested? A. Yes, sir, I do.

Q. And you didn't do that, did you? A. No, sir, I did not.

Q. In fact, I asked you three times, didn't I? A. I do not recall how many times. You may well have.

Q. Even here today, you hadn't told the jury of all the arrests that you've had, have you? A. All the ones, I believe so, yes, I have.

Q. I didn't hear you tell the jury about being arrested for having a false identification. [614] A. I believe that was already — that was already mentioned.

Q. All right. But when you told — when Mr. Kennedy asked you about you denying the arrest as not being true, you didn't tell us about that, did you? A. I don't — they don't arrest you for having a false identification. I believe I just had that whenever they arrested me at one point in time. That's not a jailable offense.

Q. Is public drunk a jailable offense? A. Yes, sir.

Q. Were you arrested for that? A. I — I believe at the same time as everything else, yes, sir, I was.

Q. You didn't tell us about that, did you? A. No, sir, I did not.

Q. You didn't tell us about resisting arrest, did you? A. No, sir, I did not.

Q. Are you telling us in regards to the driving under the influence charge that's contained on your rap sheet, that you did

not actually plead guilty to a driving under the influence but pled guilty to a lesser charge of being in control of a motor vehicle while intoxicated? A. To an APC, yes, sir.

Q. All right. That basically means that the officers are [615] saying that they didn't, or they can't prove that you were driving the vehicle at the time? They didn't catch you?

MR. JACK KENNEDY: You Honor, I object. That's an improper question. He's asked a legal question as to what the officer can do or not do. He can only ask him fact questions.

THE COURT: Sustained.

BY MR. WALKER:

Q. Well, you told the jury, you want the jury to believe that you had pulled over because you were intoxicated? A. Yes, sir, I did.

Q. So you had been driving while intoxicated? A. For about half a miles, yes, sir.

Q. Okay. Now, after we took your deposition, you read that deposition carefully, didn't you? A. Yes, sir, I read over it.

Q. Made some changes in it? A. Yes, sir, I did.

Q. Sent those back? A. Yes, sir, I did.

Q. And at that time you didn't tell us about all these other charges, did you? A. No, sir, I did not.

Q. After documents were filed in this Court accusing you of committing perjury, did you then respond and correct your [616]

deposition again? A. I didn't ever see any documents accusing me of committing perjury, but I did correct my deposition.

Q. And how long ago was it that you made these corrections? A. I don't recall.

Q. Was it within the last couple of weeks? A. I really don't recall. It may well have been.

Q. Was it in the last couple of months? A. I do not recall.

MR. WALKER: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Do you remember making, although you don't remember when, do you remember making the corrections or changes to your deposition and telling us about some additional arrests that you hadn't told us about in the deposition? A. I told Mr. Kennedy about them, yes.

Q. And did you sign a document making those changes in your deposition? A. I—I may have. I don't recall, sir, for sure.

Q. Well, if you had of made those changes, do you know where you would have been, where did you go to sign those documents? A. I'm sure it would have been in Mr. Kennedy's office.

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Q. You have been arrested for resisting arrest, haven't you? A. I do not recall. I may have been.

Q. It wouldn't surprise you, would it? A. I know at that point in time that they arrested me for that assault and battery, there were other charges that were with that one, but the main arrest complaint there was the assault and battery and that was the charge that was filed.

Q. You'd forgotten about the resisting arrest? A. If it was there. I didn't even know if it was on there.

Q. While you were on probation for this APCV? A. APC, yes, sir.

Q. While you were on probation for that offense, were you under conditions of probation that required you not to violate the law? A. At that point in time that I got the APC, I went to Marshall County and talked to the Judge there and —

Q. Mr. Burns — Mr. Burns, my question was while you were [619] on probation for APCV, were there conditions of your probation that required you not to violate the law? A. I was trying to explain the conditions of the probation but I didn't get there.

Q. Well, were you — was one of the conditions that you were not to violate the law?

MR. JACK KENNEDY: Your Honor, I object to Counsel — he's already answered the question as best he knows. It's argument now.

THE COURT: Well, overruled, but he may explain his answer.

A. What I was suppose to do for Marshall County was go over there and do some undercover drug buys for the Marshall County Police Department and I would not have to pay any charges nor probation nor any other thing like that.

MR. WALKER: Your Honor, we object to the responsiveness of the answer and ask the jury be instructed to disregard. The question was whether or not one of the conditions set out in this probation were that he was not to violate the law.

THE COURT: Sustained. The jury will not consider the answer for any purpose.

BY MR. WALKER:

Q. Were one of the conditions of your probation that you were not to violate the law? [620] A. On that time, sir, I had no probation, to my knowledge, whenever I first got the APC.

Q. This occurred over in where, Marshall County? A. Yes, sir, in Madill, Oklahoma.

THE COURT: Do you have another question, Counsel?

BY MR. WALKER:

Q. How long were you placed on probation? A. I — I don't recall the probation, so I don't know how long.

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Burns, I want to show you what's been marked for identification purposes Plaintiff's Exhibit Number 31. Does this appear to be the record from Marshall County regarding your APCV? A. Yes, sir, it does.

Q. And did you see these documents and receive these documents while you were at Court on this APCV? A. I do not recall. That was back in '89.

Q. All right. Well, I want to direct your attention to a document titled Misdemeanor Judgement and Sentence with order suspending execution of sentence and ask you to review this document and tell the jury whether or not it sets out certain conditions that you were to comply with while you were on [621] probation?

MR. JACK KENNEDY: Your Honor, I'm going to object to the form of the question. If he's asking what the document shows, I have no objection. If he asks what the Judge told him, I object to him being restricted to the document. So I think the question should be specific so I can make my objection, if he's asking — if I've made my objection understandable to the Court. If he's asking what the document says, I have no objection. If he's asking what the Court told him, I object.

THE COURT: Well, you might rephrase your question. My understanding of the question, he's asking what the document —

MR. WALKER: That's correct, Your Honor.

MR. JACK KENNEDY: I have no objection to that.

THE COURT: What the document says.

A. The document, as I read it, it says that I shall not violate any state, city or federal law, that I will not consort with people having a criminal record nor will I use intoxicating liquor or beer. And that I shall pay a certain fine, which the fine I don't see as listed there. And that I am to do three days of community service.

BY MR. WALKER:

Q. All right. And while you were on that probation, you didn't comply with those conditions, did you? [622] A. I did not know of the probation at that point in time, so I — no.

Q. You did not know you were on probation? Is that your testimony? A. There were other agreements along with that one.

Q. In fact, Marshall County filed a motion to revoke your probation, didn't they? A. I later learned during this that they did, yes.

Q. All right. And in fact, an arrest warrant was outstanding for you at the date of this incident, on May the 12th of 1991? A. Yes, sir, it was.

Q. Have you since been arrested on this matter? A. No, sir, I have not. I went and talked to the Judge and he —

Q. My question was have you since been arrested — A. No, sir, I have not.

Q. Have you since taken care of this matter? A. Yes, sir, I have.

Q. Did you take care of this matter last week? A. I — I don't believe it was last week, no.

Q. The week before? A. It quite possibly could have been. I'm not for sure of the exact date.

Q. Thank you. Now, you knew you were under oath at the [623] time we took your deposition and asked you all these questions about your prior history, didn't you? A. I do not recall. I'm sure that I did know at that point in time, yes.

Q. And even though you were under oath, you didn't tell the truth, did you? A. No, sir, I did not.

Q. And I believe you said that was because there were certain things you didn't want us to know? A. That I didn't want my family to know, yes, sir.

Q. Your family wasn't in the room, were they? A. No, sir, they were not.

Q. You've told the jury that you've had two fights your whole life? A. That's correct.

Q. Does that include the one that you were arrested for? A. Yes, sir, it does.

Q. And pled guilty to? A. Yes, sir.

Q. Paid — sentenced to 40 days in jail or something? A. Seventeen days.

Q. And who was your other fight with? A. It was when I was a freshman in high school. I don't — I don't recall who it was with.

Q. Are you intending to impress upon this jury that you do [624] not have a history of physically aggressive behavior in the past? A. I do not. Other than those two fights, I do not.

Q. Are you trying to tell this jury that you do not have a predisposition for being a physically aggressive person? A. I do not.

Q. Are you trying to impress upon this jury that you do not have a temper? A. I'm sure I have a temper. Everyone has a temper.

Q. Are you trying to impress upon this jury that you believe you do not have a hot temper? A. I do not.

Q. And you've told this jury you had no reason to be mad at Ms. Brown? A. That's correct.

**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS —
MOORE TESTIMONY**

[Commencing at page 642]

after which the following occurred:)

THE COURT: Now, ladies and gentlemen of the jury, I'll instruct you to disregard any statements made by the witness about the financial condition of Bryan County, not consider them for any purpose at this time. I'll instruct the witness to only answer the question that is asked and not volunteer non-responsive answers.

THE WITNESS: Yes, sir.

BY MR. JACK KENNEDY:

Q. Now, we were going into the deputies that you hired. How many — during your four years as sheriff, how many deputies did you hire? A. I believe I hired six or seven.

Q. All right. And if you will, who was the first deputy you recall hiring? A. Bob Wallace.

Q. And what is Bob Wallace's — what investigation did you make to determine the viability or the ability of Mr. Wallace to make the sheriff department? A. He was working — he was a past deputy, detective in the sheriff's office when I took over.

Q. So he was already a deputy in the sheriff's department when you took over? A. Yes.

Q. Was there any necessity of you having to make any [643] further investigation into his background before letting him work for you? A. No.

Q. Okay. Had you known Mr. Wallace over the years? A. I had known him quite awhile, yes.

Q. Was he, in your judgment, an experienced, capable officer? A. Yes.

Q. Who was the next one you employed? A. Bill Adams.

Q. And what was the situation in hiring Mr. Adams? A. He had worked for the past sheriff and he had — he wasn't working for him at the time I took over, so — but he was certified, and I had worked with Bill Adams when I was working with the DA's office, and he was qualified. He was state certified.

Q. Was Mr. Adams a capable deputy sheriff? A. Yes.

Q. And then who was the next deputy that you employed? A. Delores Simpson.

Q. Simpson? A. Simpson, yes.

Q. And tell the jury the circumstances by which she was employed? A. She had worked for the past sheriff and I had worked [644] with her on several cases when I was with the district attorney's office, and she was state certified.

Q. Okay. That's the female deputy sheriff we mentioned a moment ago? A. Yes.

Q. All right. And so she was a certified deputy sheriff at the time you became sheriff? A. Yes.

Q. Who was the next one you employed? A. Earl Howell.

Q. And what were the circumstances for employment Mr. Howell? A. Mr. Howell had worked with the Durant Police Department for several years. He was a certified police officer. He was a good officer, so I hired him to become a deputy.

Q. Okay. And was and is Mr. Howell a good, capable deputy? A. Yes.

Q. Who was the next one you employed? A. I believe the next one was Larry Brown.

Q. What were the circumstances of employing Mr. Larry Brown? A. He was — he worked in the jail when I took over as sheriff. He transported prisoners. I did send him to C.L.E.E.T. and he got certified, and he was put on the street.

[645] Q. And did — you knew of his background at the time he was employed, is that correct? A. Yes. He worked in the jail? Yes, he worked in the jail —

Q. And was certified thereafter to become a deputy sheriff? A. Yes.

Q. Was he a good and capable officer during the time you were sheriff? A. Yes.

Q. And who was the next one you employed? A. Jesse Carlisle (spelled phonetically.)

Q. And tell us the circumstances of employing Mr. Carlisle? A. He was jail administrator for — he was jail administrator when I took over as sheriff. He worked there for quite a — couple or three years. He was sent to jail school. He quit and went to work for Colbert, a local town, as a town marshal. They sent him and got him certified. And then when he come back from school, he worked awhile with Colbert and then I hired him as a deputy.

Q. And was Mr. Carlisle a competent deputy sheriff? A. Yes, he was.

Q. And who next did you employ? A. Jim LeBuff.

Q. And tell us the circumstances of hiring him? [646] A. He was — he took over as jail administrator when Jesse Carlisle quit and went to work for Colbert. He worked there as jail administrator for approximately a year for me. I sent him to school and got him certified and he was put on the street.

Q. And was Mr. LeBuff a good and capable deputy? A. Yes, he was.

Q. Who next did you employ? A. Robert Morrison.

Q. That's the one who previously testified in this case? A. Yes.

Q. And what were the circumstances on employing Mr. Morrison? A. I needed a deputy. Mr. Morrison, he was brought to my attention and we run a background check on him. He had worked for McAlester as a deputy sheriff. We called the sheriff in McAlester or Pittsburg County. He highly recommended him. He had worked as a police officer in Colgate, Oklahoma. We called there. They highly recommended him. He

was certified as a police officer through C.L.E.E.T., so I put him to work.

Q. And was Mr. Morrison a capable and experienced deputy sheriff? A. Yes, he was.

Q. Anyone else that you were called on to employ as a [647] deputy sheriff? A. Not that I can recall.

Q. During the tenure of your office, is it true or not that each deputy that worked in your department as a patrolman on duty was a person qualified under state law and a seasoned, capable deputy? A. Yes.

Q. What is your relationship with Mr. Stacy Burns? A. He was my nephew's son.

Q. And what do you know — can you tell us about your knowledge of him as a child growing up in Durant? A. I wasn't around him that much when he was growing up. I know as he got a little older and he got him an automobile he was — he liked to hotrod a lot. I know he got several tickets on that.

Q. To your knowledge, so far as what you knew, you can only testify to that, did he have a reputation that you knew of as being overly aggressive or fighting or things of that nature? A. Not that I know of, no.

Q. Okay. Did you know at the time he wanted to become a reserve deputy, did you know of anything that would be something that would not allow him to become a good deputy? A. No.

Q. There have been testimony here of him having gotten in fights in Norman and APCV, whatever that is, in Marshall [648]

County. Did you know of any of those at the time that he went as a reserve deputy? A. I did not know of the fight he had in Norman. I — I did — I was aware — I had heard of the trouble he had in Marshall County, yeah.

Q. The APCV or DUI or whatever it was? A. APC.

Q. Let me ask you this, Mr. Moore. As a person with 16 years of law enforcement, what is your belief as to whether or not a young man with the background that had been shown to be with Stacy Burns, has upon his right and ability to become a good police officer? A. Well, there's a lot of police officers that's — that's had fights and probably speeded and got tickets, and there's a lot of people that — almost everybody has had fights before in their life. And I don't think, you know, assault and battery, simple assault and battery would stop anybody from being a good police officer, if that's what they want in life.

Q. What is your opinion as to whether or not a person who is becoming a police officer has to be, has to have some aggressiveness in order to be a good police officer? What is your feeling, your experience as to whether or not any person who wants to become a police officer has to have a certain amount of aggressiveness in-order to be a proper police [649] officer? A. Well, they just have a lot of — a lot of willpower and a lot of courage to want to be one. You know, you have to love the job.

Q. Now, what is the highest crime rate area of Bryan County? A. Cartwright area.

Q. Has it over the years developed a reputation for crime? A. Yes, very bad.

Q. How long have you known of that area? A. Well, it

really become bad when — back when Perrin Field was here.

Q. When the air base was here? A. It was all beer joints and killings and all sorts of things.

Q. Okay. Now, I'd like to ask you about your practice as a sheriff in Bryan County as to the using of roadblocks. Have you done that in the past? A. Yes.

Q. First, why? A. Well, we tried to have roadchecks to eliminate people that was — would be drunk or drinking in an automobile or driving with their license under suspension. Any element of crime we tried to stop.

Q. Where do you normally put roadblocks in a county?

* * *

[666] Q. All right. And so at that time, would your squad car have been seen if somebody wanted to see it, there in front of the the premises? A. Yes.

Q. All right. Sheriff Moore, during your four years as sheriff of Bryan County, has anyone ever made an accusation against you or members of your patrol unit for police misconduct? A. No.

Q. Has anyone ever made a complaint against the Bryan County Sheriff's Department Patrol Division as to being abusive to people when they were being stopped out in the county in any way? A. No.

Q. During your entire tenure as a police officer, did you comply with all of the standards, training regulations and statutes for the State of Oklahoma? A. Yes.

MR. JACK KENNEDY: Pass the witness.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. WALKER:

Q. Mr. Moore, the purpose that you went on the property for regarding the — with the health department that I believe you said did not pertain to Todd or Jill Brown at all, is

* * *

[671] incident, you saw Ms. Brown and at that time she, to the best of your recollection was at least on crutches? A. I believe she was, the best I can remember.

Q. All right. And then again, two weeks later when you've told the jury you arrested Todd Brown on another unrelated charge, it's your testimony that Jill Brown rode to the jail with you and Mr. Brown? A. Yes.

Q. And Jill Brown wasn't under arrest, was she? A. No.

Q. Did you feel like you couldn't leave her at the scene because she was unable to drive that truck? A. Well, it was — you know, that was up to her.

Q. All right. A. She could have stayed there if she wanted to or she could ride to town.

Q. Right. But you told me in your deposition that it appeared to you at that time that Jill Brown wasn't in condition

to drive that truck, is that correct? A. Well, she had a cast on her leg, yes.

Q. All right. Now, in this case you made the decision to hire Stacy Burns, didn't you, as a reserve? A. I beg your pardon?

Q. You're the decisionmaker for Bryan County in regards to the Bryan County Sheriff's Department, aren't you? [672] A. Yes.

Q. Or you were at the time on May the 12th of 1991? A. Yes.

Q. And pursuant to your being the decisionmaker for Bryan County, did you make — it was your decision to allow Stacy Burns to act as a reserve, wasn't it? A. Yes.

Q. And you told the jury that you were aware that Mr. Burns had a bad driving record and that he had had this APCV, is that correct? A. Yes.

Q. All right. At the time we took your deposition, you referred to it as a DUI, I believe, is that correct? A. Well, an APC and DUI is treated the same way.

Q. Closely linked, aren't they? A. Well, I mean, they're — well, the penalty and everything would be the same, yes.

Q. And how did you obtain that information? A. I don't remember now how I got it.

Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet? A. I run his driving record, yes.

Q. All right. And you can get that rap sheet immediately, can't you? A. It don't take long.

[673] Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery. Did you see that one on there? A. I never noticed it, no.

Q. Did you notice on there he'd been arrested or charged with DWLS on several occasions? A. Had been done what on several occasions?

Q. Had been arrested for driving while license were suspended? A. I'm sure I did.

Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification? A. No, I never noticed that.

Q. Did you notice on there where he had been arrested for public drunk? A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest? A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were? A. No, I didn't.

Q. Did you not make any attempt to find out the status of [674] Mr. Burns' criminal record at that time? A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and — most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there? A. I didn't know he was on probation, no.

Q. Did you make any effort to find out? A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with DUI, didn't you? A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

Q. So you'd heard about it? A. I'm thinking I — I don't know.

Q. Did you ask — A. I don't know remember whether I seen it on the rap sheet or heard about it.

Q. All right. Well, whichever way you, it came to your attention, you didn't check to find out with the proper authorities as to what the disposition of that charge was, did you? A. I don't — I don't there had been a disposition at that time.

[675] Q. All right. A. I don't know.

Q. Is it that you don't know or you don't think it was disposed of at that time? A. I don't really know. I can't say.

Q. Did you check to see if Mr. Burns had an arrest warrant out for him? A. We — I run him through NCIC and there wasn't — didn't show no warrant, no.

Q. Now, Bryan County as a local agency, doesn't provide any training to the reserves, do you? A. Would you repeat that?

Q. Bryan County doesn't provide any training to the reserves, do they? A. Doesn't provide any?

Q. Yes, sir. A. Outside of them going to the C.L.E.E.T. school and on the-job training.

Q. All right. Sometimes that can be a tough place to learn the job, can't it? A. Well, it's about the way all of them learn it.

Q. All of them in Bryan County? A. Any other county.

Q. You authorized Stacy Burns to work as a reserve officer the night of May the 12th, 1991, didn't you? [676] A. He was there, yes.

Q. And you authorized Stacy Burns to make forcible arrests, necessary? A. I — he was not — he did not have authority to make arrests, no.

Q. He was not authorized by you to make forcible arrests? A. Not unless there was a deputy with him and the deputy told him to arrest someone or assist him in arresting.

Q. Did you ever tell Stacy Burns that? A. He knowed it.

Q. Did you ever tell him that? A. I'm sure I did.

Q. All right. Did you tell him that anybody was in charge of him? A. Did I tell him what?

Q. Did you ever tell him that somebody was in charge of him while he was out there working? A. Yes.

Q. What did you tell him? A. I told him whoever he was riding with would be in charge of him. He could not carry a gun.

He could not drive a car. He was just strictly there for — to observe and get what training he could.

MR. WALKER: May I approach the witness, Your Honor?

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**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS —
CALCLAZIER'S TESTIMONY**

[Commencing at page 687]

16 years? A. Yes, sir.

Q. Would you tell me what your duties, if you can, briefly, what your duties have been over the years with respect to what you did as a reserve deputy? A. Assist officers, assist people. That was the reason I did it, was to protect and serve, help out where I could.

Q. Would your duties as an officer require you or not to be out in the county very often as distinguished from being in Durant? A. I spent a lot of time in the county.

Q. What were the purposes of your being out in the county? A. I did a lot of patrol work. To be seen. Mostly, to — if you are seen more, law enforcement are seen out in the county more, they are a lot apt, more apt to not having crime in that area when you have a lot of visible.

Q. All right. A. When you're highly visible.

Q. Now, there have been evidence offered in this trial, Mr. Calclazier, regarding some difficulties with the law that your grandson became involved in in Cleveland County, Oklahoma or Norman. Are you familiar with the problems that occurred at that time? A. Yes, sir.

Q. What part, if any, did you play in connection with that? [688] A. I helped to hire an attorney to go up there and see what could be done about getting everything straightened out.

Q. All right. Did you go to Norman, Oklahoma yourself? A. Yes, sir.

Q. And what did you do with respect to the complaints that had been filed against your grandson? A. I talked with the attorney and found that there had been several charges —

MR. WALKER: Your Honor, we're going to object. It calls for hearsay.

MR. JACK KENNEDY: We're not offering it for the truth of what is stated but the fact of what was stated.

THE COURT: Well, it will be admitted for showing what action he may have taken. The jury will not consider any statements made to the witness by the attorney for the truth of those statements but only for the purpose of showing what action the witness took.

MR. WALKER: Your Honor, if they're not being offered for the truth of the matter, I don't know what relevance they would have.

THE COURT: Well, come to the bench.

(An off the record side bar discussion was had between the Court, Counsel for the Plaintiff and Counsel for the Defendants out of the hearing and presence of the jury, after which the following occurred:)

[689] BY MR. JACK KENNEDY:

Q. Mr. Calclazier, after you got to Norman, what did you do with respect to your grandson? A. I went and talked to the attorney that had been hired.

Q. Okay. I don't want you to tell me what any of those people tell you, but I just want you to tell the jury what you did and what you said with respect to the charges that were there against your grandson. A. What I talked to the attorney, I asked — I requested him to go before the Judge and put all the charges together in one so we wouldn't have to keep coming back to Court on two or three different charges.

Q. You didn't want to come back and forth with him on various charges? A. Right.

Q. And I'll ask you on the date that this shows on January, I believe January the 4th, 1990, I believe it is, did your grandson plead guilty to all of those things at one time, at one hearing — A. Yes, sir.

Q. — in your presence? A. Yes, sir.

Q. All right. Now, Mr. Calclazier, has Mr. Burns always tried to hold down some type of a job during his educational training in the period of time since high school?

* * *

**EXCERPTS OF TRANSCRIPT OF PROCEEDINGS —
JURY INSTRUCTIONS**

[Commencing at page 799]

* * *

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County under Title 42, United States Code, Section 1983. If you have determined that Defendant Stacy Burns either arrested Plaintiff without probable cause or employed excessive force in arresting the Plaintiff, you will then need to consider whether Bryan County, Oklahoma may be liable to the Plaintiff under Section 1983.

Plaintiff's Claim under Section 1983 against the County is for inadequate hiring and training of Stacy Burns.

A county is liable for the deprivation of a constitutional right if the deprivation was pursuant to [800] governmental custom, policy, ordinance, regulation or decision.

Sheriff B.J. Moore is an official whose acts constitute final official policy of Bryan County, Oklahoma. Therefore, if you find that the Plaintiff was injured as the proximate or legal result of Bryan County's policy, custom, ordinance, regulation or as a result of a decision by Sheriff B.J. Moore, then Bryan County is liable.

In order to prove that a county hiring or training policy violated the Plaintiff's rights under Section 1983, the Plaintiff must prove by a preponderance of the evidence that:

One, the training or hiring policies of the county's policymaker, B.J. Moore, were inadequate.

Two, the County policymaker, B.J. Moore, was deliberately indifferent in adopting the hiring or training policy.

And three, the inadequate hiring or training policy directly caused the Plaintiff's injury.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. [801] Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to Deputy Sheriff Stacy Burns the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that the Sheriff B.J. Moore can be reasonable said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County based on negligence. Plaintiff has also brought state law actions against Bryan County contending that Sheriff B.J. Moore was negligent in the hiring and training of Reserve Deputy Sheriff Stacy Burns.

In order to prove the essential elements of Plaintiff's claims, the Plaintiff must prove by a preponderance of the evidence each of the following:

One, that Sheriff B.J. Moore was negligent in the hiring and/or training of Stacy Burns.

Two, that Sheriff B.J. Moore's negligence was a proximate cause of some injury sustained by the Plaintiff.

Negligence means failure to use ordinary care; that

* * *

[810] * * *

THE COURT: Does the Plaintiff have any objections?

MR. WALKER: No objections, Your Honor.

THE COURT: The Defendant has some objections?

MR. JACK KENNEDY: Yes, Your Honor, we do.

THE COURT: I will first state before the Defendant begins for the record that all requested instructions by either party that were not substantially given in the Court's Charge are refused.

MR. JACK KENNEDY: We object to the Court's Charge for its failure to define what is meant by "custom" as required by *Minell* (spelled phonetically) and other cases. The evidence showing there was no established policy, therefore, a custom had to be also defined to the jury.

[811] We secondly object to the Charge for the failure of the Court to grant the Bryan County a good-faith defense in view, especially in view but not limited to that the County in all respects complied with the applicable state law.

We object to the instructions contained on Page 17 and 18 of the Charge relating to the policy for the reason that the Court has gone, has allowed the particular wrong of hiring Stacy Burns as

being the policy. In the instruction which the Court gave, the Court talks about a general policy but then all of a sudden it all relates to the individual actions of the sheriff with respect to the Stacy Burns.

All of the cases hold that the Plaintiff is required, and the Court is required to instruct that if there is a violation of policy, that policy has to be independent of the act as it is directed with respect to Stacy Burns.

The jury, in its issues Number 6 and 7, is allowed to consider by virtue of the instruction that all that the County had to do was improperly hire Stacy Burns or improperly train Stacy Burns, and that in and of itself is sufficient to establish a policy and/or custom. The law is quite clear, as a result of *Tuttle* and *Langerand* and *Kent vs. Harris* (spelled phonetically) that the specific deficiency of the policy must be established and the Charge, on Page 17 and 18, simply does not do that. The Charge talks about a governmental custom and policy and the general allegation at [812] the bottom of the page of the general rules relating to the custom or policy, but then the jury — the Court said that if the, without identifying what they do wrong, if they improperly hired or trained Stacy Burns, then that is a constitutional violation. I think the Court's instruction is totally improper for those reasons.

We further object to the Court's Charge for failing to require that the alleged improper training and hiring was the — strike that.

We object to the instruction because it did not require the Plaintiff to prove the specific deficiency in the training and hiring that would lead to the misconduct upon which the suit is based. We think that the law requires that the Court instruct the jury of the requisite causal connection between the injuries and

municipal policy by instructing the jury that they must show specific deficiencies in the training given police officers and not Stacy Burns individually, and that this deficiency led the misbehaving officer to engage in the alleged misconduct. And of course, the evidence does not have any showing that that occurred in this case.

Now, with respect to the excessive force, we ask the Court to instruct in accordance with the alternative charge contained in the pattern jury instructions with regard to excessive force, or at least if not the alternative, in [813] the original one because the uniqueness of this case would require that all of the matters involving good faith and qualified immunity appear in the Charge as provided as a result of *Johnson vs. Morell* (spelled phonetically) and other cases. And the Court has in its instructions taken away any reasonable and necessary good faith and that is the very issue in this case and has not followed the dictates of that pattern jury instruction.

In this connection, Judge, we would ask the Court to instruct the jury that unless you find that Bryan County sent out its officers on missions inadequately trained or there was a custom of using inexperienced trained officers on such missions, you will find for the County and against the Plaintiff on the 1983 issues.

We ask the Court — the Court failed to instruct, we ask the Court to instruct the jury that under 1983, an action will not lie for an arrest in violation of a state law, and before a person can be liable under 1983 or a county can be liable, he must have violated the federal constitution governing arrest.

We would further ask the Court to instruct in some manner the Court deems proper that there is no constitutional prohibition against an arrest for investigation where probable cause exists.

For there to be a probable cause to make an investigatory stop and an intrusion of the rights of [814] another, the officers must show a specific articulable fact in which taken together with rational inferences from those facts reasonably raise a suspicion warranting that intrusion. We think in this case, Your Honor, the actions require that some instruction be given to the jury as to the right of the officers under *Terry vs. Ohio and Others* (spelled phonetically) to make a pursuit to make an investigatory stop and to make an intrusion upon Jill Brown and Todd Brown during that investigatory stop. And a failure to do so I think is error.

We would object to the instruction regarding the negligence of the County and ask the Court to give instructions similar to this; that a County is not liable under Section 1983 for the negligence or gross negligence of its officers, including the sheriff or including Stacy Burns, or including the sheriff in failing to train Stacy Burns in the absence of evidence or at least a pattern of similar incidents in which citizens were injured or endangered intentionally or negligently by police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the sheriff's force.

We ask the Court to instruct the jury that flight from a scene on a checkpoint or roadblock could suggest probable cause to pursue and make an investigatory stop.

We further ask the Court to instruct the jury that [815] the — any alleged unconstitutional acts of Stacy Burns had to be, in order for the County to be held liable, it had to be the product of official government policy or the lack thereof.

We ask the Court to, in compliance with 220S196, I believe, of the Oklahoma statutes, to instruct that under the law of the State of Oklahoma, you're instructed that a police officer has a right to arrest a person without a warrant whenever that person

commits a public offense in his presence. Eluding the police and driving in excess of applicable speed limits are public offenses.

We further ask the Court to instruct the jury under 220S181 of the Oklahoma statutes that under the law of the State of Oklahoma, you're instructed that if an officer observes a motorist avoid a roadblock established by the officer, he is justified to stop that motorist and investigate.

And we object — I don't have the number of the instruction here — that the Court has stated regarding the law of the State of Texas. I'll make my objection that we object to the instruction that the law of the State of Texas prevent a peace officer from the State of Oklahoma to make an arrest or detain a person who has or is committing a crime in his presence. It is our belief that Article 14051 of the Texas statutes does not so hold, and thus the instruction is [816] erroneous and constitutes an improper statement of the law.

We ask the Court to instruct the jury that the law of the State of Oklahoma and in particular, 504(b), I believe, provide that if an operator of a motor vehicle willfully attempts to avoid a roadblock without receiving permission from a peace officer in attendance, he is guilty of a felony.

We would ask the Court to, in connection with — in addition to the good-faith instruction requested, that the evidence in this case showed that the County has complied in all respect with all state regulations and training and hiring and, therefore, it's to be considered in your deliberations as to whether or not the inadequate hiring or training of its officers constituted a municipal policy and/or custom.

We would ask the Court to instruct to the contrary of what it did. In this sense, we ask that you instruct the jury that if you

should find that the sheriff's deputy force in general was not inadequately trained or had the custom of using inexperienced trained officers, then you shall find that the County is not liable under 1983.

We would ask the Court to instruct the jury there is no constitutional prohibition against an arrest or investigation where probable cause exist. For there to be a probable — strike that. We've gone over that. I'm [817] repeating myself, Judge.

We would object Interrogatory Number 6 for the reason that it does not — first, for the reason that there's no evidence which holds, which supports the submission of the interrogatory for the reason that there is no showing that the hiring policy of the County was any different with respect to Stacy Burns and someone else, and the hiring policy inquired about has — asks the jury to consider only the case of Stacy Burns. Stated in a different way, the jury is asked whether B. J. Moore instituted a hiring policy with respect to Stacy Burns that was inadequate, et cetera. And the cases hold that that in and of itself is an improper inquiry.

Secondly, we object to the interrogatory because there is no evidence of a hiring policy in the case of Stacy Burns being the same policy that applied to the other officers, and that if he hired Stacy Burns differently than he hired other officers, then that should be so stated in the instruction and it would not be grounds for official misconduct of a customer policy.

THE COURT: Any more, Counsel?

MR. JACK KENNEDY: I have some more, Your Honor. I'm sorry I can't do better but I . . .

We object to Interrogatory Number 6 for the reason that

there has been no pleading to support the Interrogatory [818] Number 6. The interrogatory does not use the word "custom" as required by *Minell* and other cases. The use of the word "needs" rather than the word "rights" of the Plaintiff I think is improper. It allows the jury to consider the one hiring, one incident rather than a policy of hiring all of its officers, in direct violation of the case of the *Tuttle, Minell, Langerand, City of Kent vs. Harris, Rodriguez vs. Laveda* and others. It does not identify what action in the hiring of Stacy Burns was inappropriate or inefficient. It does not allow the good-faith defense in the interrogatory, and there's no evidence in the Charge of the institution of a policy by B. J. Moore.

With respect to Interrogatory Number 7, object to the use of Interrogatory Number 7 for the reason that there is no evidence to support that he had a separate training policy in the case of Stacy Burns or that the training policy of Bryan County was inappropriate, improper in any way. And thirdly, that a policy other than complying with 3311 and going to Cleat, could be inadequate and amount to deliberate indifference. Unless the interrogatory inquires of a general training policy specifically stated by the pleadings and evidence that the training of Stacy Burns was in keeping with the other — in keeping with his policy, then how he did as to this one officer is not an ultimate inquiry to go to the jury.

[819] The interrogatory comments that the sheriff has instituted a training policy with respect to Stacy Burns that was in keeping with the — apparently in keeping with the policy that had been going on forever during his tenure when there's no evidence to support, and certainly there's no evidence that it was inadequate, to amount to deliberate indifference.

We object to the interrogatory because it does not — is not based upon any instruction in the Charge that shows specific

deficiency which led to the misconduct. And there is no testimony that the training required of Stacy Burns had exhibited a pattern in the times previous to this incident which would lead the County to assume and believe that the incident caused by Stacy Burns was a result of inadequate training. This goes to the ultimate question without sufficient preliminary interrogatories asking about specific training or lack thereof.

We object to the statement at Page 8 of the Charge reading that Sheriff B. J. Moore, although not allowing Stacy Burns to carry a gun or operate patrol cars, he was allowed to physically seize citizens, restrain them, and place them under arrest when there is no pleading in the — or showing in the joint pre-trial order that that was a contention, and certainly there was no showing that that was a policy of the, or custom of the County which led to the incident in [820] question.

We object to the sentence on Page 11 reading as follows: On the other hand, under the law of Oklahoma under the law, an Oklahoma law enforcement officer has no right to pursue a citizen into Texas for a misdemeanor to make an arrest, for the reason that that is an incorrect statement of the law under 1983.

Under 1983, under *Terry vs. Ohio* and all the other cases, we think that the law is that a police officer has a right to pursue and make an investigatory stop and that this would in effect tell the jury that they crossing of the state line is a wrong and that Robert Morrison violated the law in doing so.

We object to the last sentence of Paragraph — on that last paragraph on that page reading: Furthermore, any person who willfully attempts to avoid a roadblock or checkpoint is guilty of a misdemeanor, for the reason, under 540(b) of the Statute of Oklahoma, he is guilty of a felony.

Generally, Your Honor, it is the contention of the Defendant that we feel that the Charge is generally insufficient in that does it does not require of the Plaintiff to plead and prove that there was a particular deficiency in the training and hiring policy of the County which has been established in the evidence, and that we ask for such instructions under Rule 51, that would require the [821] Court to instruct and submit interrogatories finding that the, or showing that one incident of police misconduct or one incident of violation of hiring and training policy cannot in and of itself constitute a policy and cannot grant the right to consider liability on the County in behalf of the Plaintiff.

Finally, on behalf of Stacy Burns, additionally, we ask the Court to find as a matter of law that Stacy Burns had qualified immunity. Secondly, that as a matter of law under the Oklahoma Tort Claims Act, if he was acting in his capacity as a reserve deputy, there cannot be any liability upon him for negligent acts taken in the line of duty.

THE COURT: Anything further?

MR. JACK KENNEDY: Nothing further, Your Honor.

THE COURT: The Defendants objections are overruled.

The jury will be instructed to begin their deliberations, and the Court will be in recess awaiting a verdict.

(Recess from 12:43 p.m. to 4:25 p.m.)

THE COURT: We have received the following notes from the jury: Please explain in laymen's terms the Doctrine of Qualified Immunity.

Two, does Interrogatory Number 2 pertain directly to Stacy Burns.

[822] The Court would propose to answer these two questions as follows: In answer to Question Number 1, I refer to the instructions previously given by the Court.

In answer to Question Number 2, I would answer it, the answer is "yes."

Does the Plaintiff have any objections or suggestions for answering the questions differently?

MR. WALKER: We have no objection, Your Honor.

MR. JACK KENNEDY: No objections.

THE COURT: All right. That's the way it will be answered then.

(Recess from 4:27 p.m. to 4:45 p.m.)

THE COURT: Be seated.

Bring the jury in.

(Jury entered the courtroom at 4:46 p.m.)

THE COURT: You may be seated.

Ms. Reeder, do you speak for the jury?

FOREPERSON REEDER: Yes, sir, I do.

THE COURT: And has the jury reached a verdict?

FOREPERSON REEDER: Yes, sir, we have.

THE COURT: Is it a unanimous verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: You may pass it to the security officer.

THE COURT: Members of the jury, I'm going to have [823] your verdict published now by having the Clerk read it. Pay close attention because after it has been read, I will poll you to be certain that that is the verdict of each one of you.

The Clerk will now read the verdict.

4:91cv229. Jill Brown vs. Stacy Burns and Bryan County, Oklahoma. Verdict of the jury:

Interrogatory Number 1: Do you find from a preponderance of the evidence that Stacy Burns arrested Jill Brown without probable cause on May 12th, 1991? Answer: We do.

Interrogatory Number 2: Do you find from a preponderance of the evidence that Plaintiff's claim for false arrest is barred under the Doctrine of Qualified Immunity as instructed by the Court? We do not.

Interrogatory Number 3: Do you find from a preponderance of the evidence that Stacy Burns employed excessive force upon the Plaintiff on May 12th, 1991? Answer: We do.

Interrogatory Number 4: Do you find from a preponderance of the evidence that Plaintiff's claim for excessive force against the Defendant Stacy Burns is barred under the Doctrine of Qualified Immunity as instructed by the Court? Answer: We do not.

Interrogatory Number 5: Do you find from a [824] preponderance of the evidence that Defendant Stacy Burns is liable to the Plaintiff for false imprisonment? Answer: We do.

Interrogatory Number 6: Do you find from a preponderance of the evidence that the hiring policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Interrogatory Number 7: Do you find from a preponderance of the evidence that the training policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Interrogatory Number 8: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the hiring of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogation Number 9: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the training of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogatory Number 10: What sum of money, if any, do you find from a preponderance of the evidence would [825] fairly and reasonably compensate the Plaintiff for any damages proximately caused by the Defendant Stacy Burns or the Defendant Bryan County, acting through its policymaker, Sheriff B.J. Moore? Answer: Past physical pain, \$5,000. Future physical pain, \$10,000. Past mental pain and anguish,

\$1,000. Future mental pain and anguish, \$1,000. Past physical impairment, \$75,000. Future physical impairment, \$360,000. Past disfigurement, \$1,000. Future disfigurement, \$2,000. Loss of income in the past, \$36,000. Loss of earning capacity in the future, \$180,000. Deprivation of constitutional right not to be subjected to excessive force, \$50,000. Deprivation of constitutional right for loss of liberty, \$50,000. Damage to reputation, five hundred. Past medical expenses, \$65,802. Future medical expenses, \$90,000.

Interrogatory Number 11: What is a reasonable fee for the necessary services of Plaintiff's attorneys in this case stated in dollars and cents? For preparation and trial, \$65,000. For an appeal to the Court of Appeals, 12,500. For making and responding to an application for Writ of Certiorari to the United States Supreme Court, 5,000. If application of writ is granted by the Supreme Court of the United States, 5,000.

Interrogatory Number 12: What sum of money, if any, do you find in your discretion should be assessed against the Defendant Stacy Burns as exemplary or punitive [826] damages for the constitutional violation suffered by the Plaintiff? Answer: \$20,000. Date 4/19/93, Debbie Reeder, Foreperson.

THE COURT: Ms. Reeder, is that your verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: Mr. Fullington, is that your verdict?

JUROR FULLINGTON: Yes, it is, Your Honor.

THE COURT: Mr. Andrews, is that your verdict?

JUROR ANDREWS: Yes, it is, Your Honor.

THE COURT: Mr. Richards, is that your verdict?

JUROR RICHARDS: Yes, it is, Your Honor.

THE COURT: Ms. Russell, is that your verdict?

JUROR RUSSELL: Yes, it is, Your Honor.

THE COURT: Mr. Lagos, is that your verdict?

JUROR LAGOS: Yes, Your Honor.

THE COURT: Ms. Irwin, is that your verdict?

JUROR IRWIN: Yes, it is, Your Honor.

THE COURT: Mr. Barnes, is that your verdict?

JUROR BARNES: Yes, Your Honor.

THE COURT: All right. The verdict, then, will be filed.

I thank you, ladies and gentlemen of the jury, for your long and diligent service as jurors in this case. Our judicial system could not function without the function of jurors. They're indispensable. And so you have, indeed, [827] rendered a valuable service to your system.

I remind you that under the rules of this Court you do not have to discuss your service as jurors in this case with anyone unless ordered to do so by the Court. And furthermore, the attorneys in the case are not to contact you about your service in this case unless — without first obtaining the permission of the Court.

Again, I thank you. And you may now pass from the courtroom.

(The jury left the courtroom at 5:55 p.m.)

THE COURT: If there is nothing further at this time, the Court is adjourned.

MR. JACK KENNEDY: Your Honor, when can I make my objection that —

THE COURT: I will advise the report that I had indicated earlier in the day in the absence of the court reporter that I would — this was before the case was submitted to the jury, that I would permit Mr. Kennedy to make an objection, an additional objection to the Charge and consider that it was timely made.

You may now do that, Mr. Kennedy. And the remainder of you may be seated.

MR. JACK KENNEDY: Your Honor, the Defendant further objects to the failure of the Court to submit an issue inquiring or allowing the jury to proportion the [828] issues, the amount of negligence between Stacy Burns and Jill Brown. Since the disputed testimony was raised to the action of Jill Brown which may be believed by the jury in bringing about the action of Stacy Burns, that, therefore, under the law of the State of Texas, the comparative negligence of the parties should have been submitted — should be submitted to the jury in order that the jury would have an opportunity to find, if they wanted, that Jill Brown's negligence was involved and should be compared with that of the Plaintiff.

Further, that since the matter of the joint enterprise was tried with consent, that the negligence of Ms. Brown should be

considered in light of the actions of her husband, Rodney Todd Brown.

We would ask that the Court submits an issue similar to that of the 5th Circuit Pattern Jury Instruction, Civil Law Number 1(a), or issues similar to that.

THE COURT: As I advised Counsel at the time that the request was made and as I now state for the record, the request is denied.

The Court is adjourned.

(Proceedings adjourned at 5:57 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ illegible
COURT REPORTER

6-25-93
DATE